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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
JAMES B. EDWARDS, Secretary of Energy,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

The "property" concept was the basic building block of the federal program under which the prices of crude oil produced in the United States were controlled. In regulations issued when that price control program was created in 1973, the term "property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum."

The questions are:

1. Where the Temporary Emergency Court of Appeals, which has exclusive appellate jurisdiction over cases arising under that federal price control program, has twice ruled that the focus of the "property" definition is not on the "lease or fee interest" but on the "right to produce" crude oil, and that the sovereign acts of State regulatory authorities, such as the establishment by Louisiana's Office of Conservation of production units, delimit that "right to produce," did that court err in later upholding an agency interpretation of "property" that ignored the significance of such sovereign acts and, instead, interpreted "property" as synonymous with the "lease or fee interest."

2. May the Temporary Emergency Court of Appeals defer, without analysis, to the agency's "general position" that the lease or fee interest, not the sovereign act of a State regulatory authority, defines the "property," when that position is not supported by the language of the "property" definition, was first adopted three years after the promulgation of that definition, is inconsistent with earlier agency interpretations of that definition and cannot be reconciled with that court's own prior construction of that definition.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Temporary Emergency Court of Appeals are listed in the caption of the case in this Court.*

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* The names of all parent companies, non-wholly-owned subsidiaries and affiliates of Texaco Inc. are set forth in Appendix H hereto.

The following are the names of all parent companies, non-wholly-owned subsidiaries and affiliates of The Louisiana Land And Exploration Company: CLAM Petroleum Company (affiliate); and The Louisiana Land Offshore & Exploration Company (non-wholly-owned subsidiary).

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The petitioners the State of Louisiana ("Louisiana"), Texaco Inc. ("Texaco") and The Louisiana Land And Exploration Company ("LL&E") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals entered in this proceeding on October 4, 1982.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals is reported at 690 F.2d 180 (App. A). The opinion of the district court denying respondents' motions to dismiss is reported at 507 F.Supp. 1365 (App. D).

The opinion of the district court granting summary judgment to petitioners is reported at 519 F.Supp. 351 (App. E).

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on October 4, 1982 (App. B). The Order of that court denying rehearing with suggestion of rehearing *en banc* was entered on November 26, 1982 (App. C). This Court has jurisdiction under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULINGS INVOLVED

This case arises out of petroleum pricing regulations promulgated by the Cost of Living Council ("CLC") under the authority of the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 note, as part of Phase IV of the Economic Stabilization Program, and originally codified at 6 C.F.R. § 150.353 *et seq.* *See* 38 Fed. Reg. 22536 (August 22, 1973). Pursuant to Section 4(a) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 753(a), the then Federal Energy Office ("FEO") republished and recodified the CLC petroleum regulations, without substantive change, as the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 211 and 212. 39 Fed. Reg. 1924 (January 15, 1974). The regulatory definition involved in this case was then codified at 10 C.F.R. § 212.72 (App. F). The challenged agency interpretation of that definition was first set out in the preamble to a rulemaking dated August 20, 1976. 41 Fed. Reg. 36172 (August 26, 1976) (App. G). That interpretation was later republished in the form of an agency Ruling, Ruling 1977-1. 42 Fed. Reg. 3628 (January 19, 1977).

STATEMENT OF THE CASE

1. This case presents the issue of the meaning of the term "property," a term of "fundamental importance" to the regulatory program under which the price of crude oil produced in the United States was controlled. *See* App. A at 4a. When it established the price control program in August 1973, the Cost of Living Council defined "property" as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." *Id.* at 5a. With no guidance from the CLC, and under threat of civil and criminal sanctions, crude oil producers had immediately to apply that definition to thousands of producing entities and to price their crude oil accordingly.

In Louisiana, a large percentage of crude oil is found under vast State leases that may cover hundreds of square miles. *See* App. E at 48a. Since 1940, Louisiana's Office of Conservation ("LOC") has regulated crude oil production in the State by, *inter alia*, establishing reservoir-wide production units within these State leases and controlling the amount of crude oil produced from these units. *Id.* at 47a-48a. Reflecting the pervasive effect that the LOC's control over production within Louisiana has on the "right to produce" crude oil, crude oil producers in Louisiana, including petitioner Texaco, designated such Louisiana production units as "properties" for federal pricing purposes.

In August 1976, the Department of Energy ("DOE"),[1] for the first time, and in the face of earlier contrary interpretations, interpreted "property" to preclude the designation of separate Louisiana production units as "rights to produce" and, hence, "properties." App. D at 35a-36a. On the basis of that interpretation, the DOE then commenced administrative proceedings against peti-

[1] As used herein, the term "DOE" includes the DOE and its predecessor agencies, the FEO and the Federal Energy Administration ("FEA"), and, where applicable, respondent Secretary of Energy.

tioner Texaco and others, alleging over one billion dollars in crude oil pricing overcharges. In its decision in this case, the Temporary Emergency Court of Appeals upheld the DOE's belated interpretation, despite the fact that, in an earlier decision, that same court had ruled that orders creating Louisiana production units delimit the "right to produce" and thus create "properties."

The court went on to grant summary judgment for the DOE despite the fact that the Department had neither sought such relief nor made a record to support it and, indeed, had argued that summary judgment was inappropriate.

Regulatory Background

2. In June 1973, as part of the Economic Stabilization Program instituted under the Economic Stabilization Act of 1970, as amended, the President imposed a freeze on the prices of all non-agricultural commodities and services, including domestically-produced crude oil. *See* Executive Order No. 11723, 38 Fed. Reg. 15763 (June 15, 1973). Shortly thereafter, in July 1973, the Cost of Living Council, "recogniz[ing] a need to stimulate increased [domestic crude oil] production," proposed to modify the crude oil price freeze by creating, as an "incentive plan," a "two-tier pricing system for crude oil." 38 Fed. Reg. 19464, 19467 (July 20, 1973). Basically, under that system, the amount of oil produced monthly from a "property" up to the amount produced from that "property" in the corresponding month of 1972 was classified as "old oil," to be sold at controlled prices. Increased production from that "property," and production from newly-developed "properties," were classified as "new oil," to be sold at higher market-set prices. *See* App. A at 4a. This "two-tier" system had a dual objective: to control inflation by holding down the price of currently-produced oil, and to stimulate new production by allowing "new oil" to be sold at uncontrolled market prices. *Id.* at 14a.

As the court below recognized,

> Because the two-tier system was thus based on a property-by-property comparison of current production with 1972 production, the definition of the term "property" was of fundamental importance.

Id. at 4a. Notwithstanding the importance of the concept, the CLC's July 1973 Notice of the proposed pricing regulations did not include a definition of the term "property."

In the final regulation, effective August 19, 1973, the CLC did define the term "property":

> "Property" is the right which arises from a lease or from a fee interest to produce domestic crude petroleum.

38 Fed. Reg. 22536, 22538 (August 22, 1973). *See* App. F. That definition, in the words of the court below, was "rudimentary." App. A at 4a. Furthermore, the preamble to the regulation was silent as to the definition's meaning and application. And, as the agency itself later acknowledged, neither the CLC nor its successors, the Federal Energy Office and the Federal Energy Administration, gave producers any guidance as to its meaning for more than two years. 41 Fed. Reg. 36172, 36175 (August 26, 1976), App. G at 69a-70a. Nonetheless, producers had to apply that "rudimentary" definition immediately to thousands of producing entities to identify their "properties" for price control purposes.

3. The DOE did not issue the first public interpretation of the "property" definition until September 1975, fully two years after the initial promulgation of the regulation. App. A at 5a. In that interpretation, Ruling 1975-15, the DOE acknowledged the "right to produce" as the core concept of the "property" definition:

> For purposes of the price regulations then, the property concept is one that identifies the *right to produce*

> *crude oil*, whether that right arises from a lease or from a fee interest.

40 Fed. Reg. 40832 (September 4, 1975) (emphasis original). Ruling 1975-15 further recognized that producing entities other than leaseholds or fee interests, such as "units," could embody the "right to produce" and thus define "properties" for purposes of federal price controls. The agency also informed producers that, although the mere existence of separate reservoirs within the boundaries of a single lease would not, in itself, give rise to separate "properties," "where there are separate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property." *Id.* at 40833.

4. However, the DOE remained unclear as to the meaning and scope of the "right to produce" concept. In testimony before a congressional committee, the FEA's Deputy Administrator admitted: "It was not clear throughout that period [August 1973 to August 1976] exactly what the [1973 "property"] regulation meant; it was not even clear to the regulatory agency itself." [2]

5. In April 1976, almost three years after the CLC promulgated the "property" definition, the DOE published its "tentative interpretation" as to what "property" meant "since the initiation of the price regulations." 41 Fed. Reg. 16179, 16180 (April 16, 1976). The DOE emphasized Ruling 1975-15's recognition that "FEA regulations utilize, as a reference, a property concept, based upon the right to produce crude oil, ..." *Id.* at 16179. The DOE "tentatively concluded" that state-recognized production units could constitute separate "properties" under the 1973 definition. *Id.* at 16180. Indeed, the DOE

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[2] Actions Taken By The Federal Energy Administration To Implement The Pricing Requirements Of The Energy Policy And Conservation Act: Hearing Before The Subcomm. On Energy And Power Of The House Comm. On Interstate And Foreign Commerce, 94th Cong., 2d Sess. 103 (1976) (Statement of Hon. John A. Hill).

specifically recognized that Louisiana production units do constitute such "rights to produce":

> For example, in Louisiana, where unitization may be compelled by the Commissioner of Conservation, the recognition by the state of producing entities is generally based upon factors other than merely surface boundaries. Such productive entities are called "units," . . . . [*I*]*n Louisiana each state-recognized unit may therefore appropriately describe a property*, with each lease upon which is reported non-unitized production also appropriately describing a separate property.

Id. (emphasis added). Thus, as late as April 1976, the DOE interpreted the original "property" definition to mean that Louisiana reservoir-wide units are "properties."

6. However, in August 1976, the DOE abruptly reversed itself and issued the "formal interpretation" of the 1973 "property" definition that petitioners challenge in this action. 41 Fed. Reg. 36172, 36178 (August 26, 1976), App. G at 52a, 83a. In that interpretation, the DOE all but disregarded its prior pronouncements that the "right to produce" crude oil could derive from instruments other than leases or deeds. Instead, it took the position that the term "right to produce" is "generally synonomous [sic] with the concept of 'working interest,' . . .," App. G at 74a, and that the "working interest" is " '[t]he operating interest under an oil and gas lease.' " *Id.* at 67a. From this, the DOE concluded:

> [T]he literal meaning of the term "property," as defined by FEA, is generally to be understood as synonymous with the physical "tract" or "premises" as to which a working interest is established by an oil and gas lease, or by a fee interest.
>
> * * * *
>
> Although the evidence is not unambiguous, FEA has concluded that CLC by its definition of the term

> "property" intended to refer to the premises described in the oil and gas lease pursuant to which crude oil was being produced.

Id. at 66a. By imputing this intention to the CLC, the DOE held that "property" had, since August 1973, meant the premises defined by a lease or fee interest, but not by other "rights to produce."

The DOE's 1976 interpretation, if correct, meant that producers of crude oil in Louisiana should not have regarded State orders creating reservoir-wide production units as "rights to produce" and should not on that basis have treated such units as "properties." However, at the same time that it construed the "property" definition as having precluded such treatment since August 1973, the DOE ruled that each state-recognized reservoir could, as of September 1, 1976, be treated as a "property." *Id.* at 86a.[3]

Crude Oil Production And Regulation In Louisiana

7. For many years, Louisiana has been the second largest crude oil producing state in the continental United States. A major portion of Louisiana crude oil production is derived from premises leased from the State. In many instances, the areas encompassed by such leases are vast. *See* App. E at 48a. For example, as of August 1973, when the CLC imposed the price control system, over 60 percent of Texaco's annual production of more

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[3] The DOE redefined "property" to add a second sentence to the original definition. Effective September 1, 1976, "property" was defined as follows:

> "Property" means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation.

App. G at 110a.

than 100 million barrels of Louisiana crude oil came from just six such large State leases. Two such leases, State Leases 335 and 340, both leased in 1936, each originally covered more than 1,200 square miles—each just slightly less than the area encompassed by the State of Rhode Island. State Lease 340, after selections and releases of portions thereof by Texaco, now covers more than 271 square miles, with oil from that Lease being produced from eight separate tracts, some of which are located more than 40 miles apart. State Lease 335 now covers more than 21 square miles and consists of three separate tracts, one of which is located more than 28 miles from the other two. Texaco's four other large State Leases referred to above have similar broadly-scattered producing configurations.

8. Since 1940, long before the institution of federal crude oil price controls, Louisiana has regulated oil and gas production within the State on the basis of oil and gas production units. These units are established in order to insure the orderly development of petroleum resources, to prevent the waste of such resources and to avoid the drilling of unnecessary wells. La. Rev. Stat. Ann. 30:2, 30:3(1), 30:9B. *See* App. A at 7a. Such units, whether "reservoir-wide" (*i.e.*, one unit encompasses an entire producing reservoir) or less than reservoir-wide (*i.e.*, more than one unit is established to extract crude oil from a single reservoir), are established on the basis of the geological limits of the producing reservoir, not on the basis of lease lines or fee interest boundaries. App. E at 47a.

The Louisiana Office of Conservation has promulgated detailed restrictions on the production of oil and gas and has imposed extensive requirements for reporting drilling and production activities. The LOC sets an allowable rate of production for each unit and limits production from that unit to that allowable rate. Production is generally reported to Louisiana authorities for royalty and severance tax purposes on a unit basis. Through

this comprehensive regulatory system, the State pervasively controls and regulates the amount and rate of crude oil production within its borders.

9. When the two-tier pricing system was established in August 1973, crude oil producers had two weeks in which to make their "property" designations. The only guidance that producers had in making their designations were the "rudimentary" language of the definition itself; the knowledge that the two-tier system was designed to provide an incentive to increase production; and the expectation that the price control system was to expire in eight months or less and thus was to be implemented with minimal disruption to normal business functions. None of these factors suggested that producers could treat only leaseholds or fee interests as "properties." Indeed, in Louisiana, the incentive objective dictated that producers not treat the lease as the "property" since, if the entire lease were treated as a single "property," the natural decline in output from currently producing reservoirs underlying a large multi-reservoir lease would deny the intended incentive of "new oil" prices to oil produced from newly-developed reservoirs on that lease. *See* App. E at 48a. Moreover, in Louisiana, Texaco and other producers had in place reporting and accounting procedures that were based on the long-standing LOC system of regulating and monitoring oil and gas production on the basis of production units. *Id.* at 47a. Consequently, these producers designated as separate "properties" separate reservoir-wide LOC production units located within the geographic boundaries of a single lease. App. A at 7a.

Proceedings Below

10. In May 1979, the DOE issued Proposed Remedial Orders ("PRO") against petitioner Texaco and other producers of crude oil in Louisiana. The PRO against Texaco alleged that Texaco had overcharged purchasers of crude oil by $748 million and sought, including interest, $888 million in refunds. App. A at 3a; App. D at 30a. Texaco filed a Notice of Objection to the PRO,

whereupon an administrative proceeding was instituted before the DOE's Office of Hearings and Appeals, pursuant to 10 C.F.R. Part 205, Subpart O. App. D at 30a-31a.

11. In May 1980, Louisiana brought the instant action, challenging the DOE's 1976 interpretation of the 1973 "property" definition, in the United States District Court for the Western District of Louisiana.[4] Texaco and LL&E intervened as of right.[5] The district court granted petitioners' motion for summary judgment, declaring that petitioners could properly have treated reservoir-wide LOC units as "properties" and enjoining the DOE from enforcing against petitioners any contrary "property" interpretation. App. E at 49a.[6]

The court observed that the original "property" definition promulgated by the CLC was ambiguous, unclear and "offered no clue whatsoever" that separate reservoir-

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[4] The district court had jurisdiction over this action under Sections 210(a) and 211(a) of the ESA, as carried forward by Section 5(a)(1) of the EPAA, as amended, 15 U.S.C. § 754(a)(1); Section 532(b) of the Energy Policy and Conservation Act, as amended, 42 U.S.C. § 6393(b); and Section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b). Jurisdiction was also based on 28 U.S.C. § 1331 and on the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706.

[5] Texaco had initially filed suit against the DOE in the United States District Court for the District of Delaware. Louisiana and LL&E intervened in that action. On the DOE's motion, that court dismissed the complaints of Texaco and LL&E on the ground that they were not ripe for adjudication. The court declined to dismiss Louisiana's complaint, withholding decision until the DOE filed its answer and indicated whether it would challenge venue in Delaware. *Texaco Inc.* v. *Dep't of Energy*, 490 F. Supp. 874 (D.Del. 1980). Louisiana voluntarily dismissed its complaint in that court and brought this action in Louisiana.

[6] Earlier, the district court had denied respondents' motions to dismiss petitioners' complaints for lack of standing and ripeness and for failure to exhaust administrative remedies. App D.

wide LOC units could not be treated as separate "properties." *Id.* at 49a, 50a. It noted that the "right to produce may arise from more than one basis or designation." *Id.* at 47a. The court then discussed the characteristics of reservoir-wide LOC units and concluded that "the designation of such units as properties is consistent with the objectives of the two-tier pricing system established in 1973." *Id.* at 48a. On this basis, the court decided that it was reasonable for producers in Louisiana to have treated such units as "properties" prior to the DOE's belated adoption of its "property" interpretation in August 1976. *Id.* at 49a.

The court further found that the DOE itself had been unclear as to the meaning of the "property" definition before August 1976. *Id.* It observed that the DOE had tentatively concluded in April 1976 that reservoir-wide LOC production units could properly be designated as "properties." *Id.* The court decided that the totality of these circumstances dictated that it should not defer to the DOE's belated interpretation of "property" or allow the DOE to enforce that interpretation against petitioners for the period prior to the August 1976 amendment to the "property" definition. *Id.* at 48a-49a.

12. On appeal, the Temporary Emergency Court of Appeals ("TECA") reversed the district court's grant of summary judgment to petitioners and directed that summary judgment be entered for the DOE. App. B. In its opinion, the court first recalled its earlier holdings that " '[t]he focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest.' " App. A at 14a. It then acknowledged that the DOE could "rationally" have relied on "concepts of state regulation in clarifying the meaning of the 'right to produce.' " *Id.* at 15a. Nevertheless, it upheld the DOE's August 1976 interpretation that "the lease defines the property" on the sole ground that that interpretation was also "reasonable." *Id.* at 14a, 18a. In doing so, it effectively ignored the "right to produce" lan-

guage in the "property" definition, concentrating instead on the "fee or leasehold" aspect of that definition.

TECA then attempted to distinguish this case from its earlier decision in *Grigsby* v. *Dep't of Energy*, 585 F.2d 1069, *modified on rehearing*, 585 F.2d 1080 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979). In *Grigsby*, TECA had analyzed the "right to produce" concept and had concluded that an order of the Louisiana Office of Conservation establishing a single "unit" out of parts of several leases created a new "right to produce" and, therefore, a new "property." 585 F.2d at 1083, 1085. Here, TECA sought to distinguish *Grigsby* on the ground that production from several reservoir-wide LOC units lying within a single lease could not be "gerrymandered" where the lease defines the "property," whereas production from a single unit composed of parts of several leases, as in *Grigsby*, could be "gerrymandered" if each lease were considered a "property." TECA concluded that in *Grigsby*, therefore, the DOE was justified in "depart-[ing] from its general position that the lease defines the property" whereas the DOE had "no reason" to do so here. App. A at 17a, 18a. TECA did not explain how the fundamental "right to produce" concept supports such a distinction.

TECA then rejected, without independent analysis, the district court's determination that the DOE's belated, inconsistent "property" interpretation did not merit judicial deference. *Id.* at 18a. In so ruling, TECA ignored the criteria for deference established by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Thus, TECA deferred to the DOE's interpretation without disputing the district court's findings that petitioners' interpretation was consistent with the regulatory objectives of the price control system and that the DOE's August 1976 interpretation was inconsistent with its earlier pronouncements and was not apparent to the industry—or even to the agency—during the period it purports to control. *See*

App. E at 48a-49a. Instead, TECA noted that the DOE had consistently maintained that separate reservoirs in and of themselves are not separate "properties," but failed to apprehend that that position of the DOE is not at issue in this case. *See* App. A at 15a. In addition, TECA stated—incorrectly and without record support—that petitioners had never sought agency guidance as to the "property" definition. *Id.* at 20a.

Moreover, TECA not only vacated the district court's order granting summary judgment to petitioners, but directed the district court to enter summary judgment for the DOE, App. B, even though the DOE had not requested summary judgment or made a record to support such relief and, in fact, had insisted that material issues of fact were in dispute and required resolution. This *sua sponte* grant of summary judgment for the DOE denied petitioners a full hearing on issues that bear on the agency's claim against Texaco for nearly one billion dollars, perhaps the largest claim ever made by a federal agency against a single regulated party.

REASONS FOR ALLOWING THE WRIT

"Property," the most fundamental concept of the federal program governing the pricing of domestic crude oil, has been left in unconscionable confusion by the decision below. In three decisions—by three different panels composed of nine different judges—the Temporary Emergency Court of Appeals has produced diametrically opposed and irreconcilable interpretations of "property." In the first, the court ruled that a Louisiana Office of Conservation production unit constituted a "property" because the focus of the definition was on "the right to produce," not the lease, and "such a 'right to produce' is controlled, limited, or extended by contractual agreement and state authorities." *Grigsby*, 585 F.2d at 1083. In the second, the court confirmed that focus on the "right to produce" as a matter of principle, holding that "property" meant something "obviously quite different" from

a "lease or fee interest." *Pennzoil Co.* v. *Dep't of Energy*, 680 F.2d 156, 168 (Temp. Emer. Ct. App. 1982). However, in the third—the decision below—the court inexplicably deferred to a belated agency interpretation that the focus of the definition was the "lease or fee interest" and thus that Louisiana production units did not define "properties." In so doing, the court ignored its own precedents, thereby creating a conflicting and inconsistent rule within the judicial body having exclusive jurisdiction to review the administration of this important regulatory program.

The court abdicated its responsibility of judicial review in reaching this extraordinary conclusion. The court deferred to the agency's belated view on the sole ground that it was "reasonable." It failed to consider those factors which this Court held in *Skidmore* determine whether deference should be accorded to an agency interpretation. It never focused on the timing of the agency interpretation, even though that interpretation was issued fully three years after the definition itself and at the end of the period involved in this case. It never focused on the consistency or inconsistency of the agency interpretation with earlier agency pronouncements, even though the agency position was an abrupt departure from the agency's earlier pronouncements. And it never focused upon the thoroughness of the agency's consideration or the validity of its reasoning, even though that court itself had twice interpreted the definition in a directly contrary way and even though senior agency officials had admitted to Congress that the meaning of the definition had never been clear to the agency itself.

The result is not only gross injustice to petitioners, who are penalized for failing to predict in 1973 the agency's change of position in 1976 and from whom the DOE consequently seeks almost one billion dollars, but also confusion and uncertainty generally in other judicial and administrative cases involving billions of dollars in alleged overcharges in the sale of crude oil. Similar con-

fusion and uncertainty is now a serious threat in the administration of the Crude Oil Windfall Profit Tax Act as well.

1. *The meaning of "property" is an important question of federal law.* Under the crude oil pricing regulations, "the definition of the term 'property' was of fundamental importance." App. A at 4a. In fact, "the property concept" was "the basic building block of the two-tier system for pricing old and new oil." *Id.* at 14a. Although the petroleum price controls have been terminated,[7] numerous lawsuits and administrative proceedings involving the interpretation and application of the regulations implementing those controls persist. At stake in these lawsuits and proceedings are claims of crude oil pricing overcharges totalling in the billions of dollars.[8] It can be expected that those administrative proceedings that result in determinations adverse to producers will eventually be challenged in the federal courts. Since the meaning and application of "property" is at issue in most of these cases and proceedings, the question at issue here as to the correct interpretation of that term is likely to consume a considerable amount of administrative and judicial energy and resources for years to come.

Moreover, "property" is an equally critical concept under the Crude Oil Windfall Profit Tax Act, P.L. 96-223.[9]

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[7] Executive Order 12287, 46 Fed. Reg. 9909 (January 30, 1981).

[8] For example, on the same day that the DOE issued its Proposed Remedial Order against Texaco, it issued PROs against six other major crude oil producers. In total, the DOE charged these seven producers alone with having overcharged their customers by $1.7 billion. Most of these overcharge claims continue to be litigated before the DOE's Office of Hearings and Appeals.

[9] In *Ptasynski* v. *United States*, 550 F.Supp. 549 (D. Wyo. 1982), the United States District Court for the District of Wyoming held the Windfall Profit Tax Act to be violative of the uniformity clause of the United States Constitution, art. 1, § 8, cl. 1. However, the court ordered that the tax continue to be collected until a higher court has passed upon the correctness of its decision.

Under that Act, crude oil production is classified into "tiers" that determine both the rate of tax and the increment of profit that is subject to the tax. Aside from stripper well ("tier 2") production, oil is classified as "tier 1" or "tier 3" oil depending upon whether it is produced from a "property" from which there was commercial production in calendar year 1978. The United States General Accounting Office ("GAO") has stated that "[t]he basic determinant of the windfall profit tax rate is 'property,' a concept which the act incorporates by reference to Department of Energy regulations." [10]

As the GAO recognized, Congress, when it passed the Windfall Profit Tax Act, anticipated that for purposes of the tax, "property" would have "[g]enerally . . . the same meaning as that term is given by the [crude oil] price control regulations." S.Rep. No. 394, 96th Cong., 1st Sess. 52 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 461. Indeed, the Internal Revenue Service ("IRS"), the agency that administers the windfall profit tax program, has promulgated a "property" definition that incorporates the "right to produce" language of the price control definition. 26 C.F.R. § 150.4996-1(i)(1), 47 Fed. Reg. 50858 (November 10, 1982). The IRS has indicated that when it publishes rules relating to the "property" treatment of "separate properties subject to a single right to produce" and to "unitizations," it "will generally follow the rules set forth in FEA Rul. 1977-1, 42 FR 3682 [1977], and FEA Rul. 1977-2, 42 FR 4409 [1977]." 47 Fed. Reg. at 50858.

Thus, it is important not only to current and future cases under the price control regulations, but also to proper administration of and compliance with the windfall profit tax system, that questions concerning the correct meaning and application of "property" be resolved clearly, definitively and coherently.

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[10] U.S. General Accounting Office, Uncertainties About The Definition And Scope Of The Property Concept May Reduce Windfall Profit Tax Revenues, GAO/GGD 82-48, May 13, 1982, at 1.

2. *The Temporary Emergency Court of Appeals has confused rather than clarified the meaning of "property."* In 1971, when Congress amended the Economic Stabilization Act, it created TECA and gave it exclusive jurisdiction over all appeals in cases and controversies arising under that Act and the regulations issued thereunder. *See* Section 211(b) of the ESA, 12 U.S.C. § 1904 note. It did so "[i]n order to funnel into one court all the appeals . . . and thus gain in consistency of decision," and to "insur[e] prompt and consistent adjudication of all appeals from the district courts. . . ." S. Rep. No. 507, 92d Cong., 1st Sess, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283, 2292, 2293. However, in dealing with the most fundamental concept of the crude oil pricing system, the "property" definition, TECA has not provided the "consistency of decision" that Congress required of it. Since no other court of appeals has concurrent jurisdiction to interpret that regulation, only this Court can provide the consistency and clarity that TECA's decisions lack.[11]

Three entirely different TECA panels have rendered three major decisions on the meaning of the "property" definition.[12] In the first such decision, *Grigsby* v. *Dep't of Energy*, TECA focused on the actual language of the definition and concluded:

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[11] Because TECA has exclusive appellate jurisdiction over cases arising under the price control regulations, there will be no conflict among the courts of appeals on this issue. However, as shown *infra*, there is a conflict among decisions of TECA on the meaning of "property."

[12] Unlike other specialized courts such as the Tax Court or the Court of International Trade, TECA is not composed of judges whose primary responsibility is to sit on that court. Rather, TECA is composed of judges of the United States district courts and courts of appeals who are designated by the Chief Justice of the United States from time to time to serve on that court. *See* Section 211(b)(1) of the ESA, 12 U.S.C. § 1904 note.

> The focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest.

585 F.2d at 1083. The court's conclusion was consistent with the DOE's first interpretation of the definition, announced in Ruling 1975-15, that the "property concept [is] based upon the right to produce crude oil, ..." and that "[f]or purposes of the price regulations then, the property concept is one that identifies the *right to produce crude oil*. . . ." 40 Fed. Reg. at 40832 (emphasis original).

The court then independently analyzed the meaning of "right to produce" as a concept of general applicability. It determined:

> The "right to produce" arises from a combination of sources, including, but not limited to, the nature of the ownership interest, contractual extension or restriction of ownership interest, and *orders of state regulatory agencies.*

585 F.2d at 1083 (emphasis added).

The panel in *Grigsby* was particularly conscious of the role played by the acts of the sovereign states—in that case, as in this, Louisiana—in determining the "right to produce":

> A mineral fee owner has a "right to produce" *subject to state law.* A mineral leasehold owner has a "right to produce" subject to the terms of the lease *and state law.* . . . Although the fee or leasehold interest may be the origin of the "right to produce," such a "right to produce" is controlled, limited, or extended by contractual agreement *and state authorities.*

Id. (emphasis added).

In *Grigsby*, TECA gave careful consideration to the effect on the "right to produce" of an order of the Louisiana Office of Conservation establishing a crude oil production unit. TECA held that the order that established the unit created a "property." *Id.* at 1084-85. That order

was issued by the same body whose orders establish and recognize the units here at issue and control, limit or modify the "right to produce" in Louisiana. In holding the order to have established a "property," TECA relied not on any interpretation or ruling of the DOE, but on its own interpretation of the actual words of the definition itself.

TECA's next considered analysis of the "property" concept came in *Pennzoil Co.* v. *Dep't of Energy*, issued in April 1982. In that case, the panel focused, as had the panel in *Grigsby*, on the actual language of the definition and concluded:

> The statement of the definition that "property means the right which arises from a lease or fee interest to produce crude petroleum" *is obviously quite different in meaning* than if the regulation had provided that "property means a lease or fee interest producing crude oil." As *Grigsby* points out, "[t]he focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." 585 F.2d at 1083.

680 F.2d at 168 (emphasis added). On this basis, the court rejected the argument that, in the context of a production unit formed out of parts of several leases, the leases constituted the "properties." *Id.*

In *Pennzoil*, TECA noted that its decision in *Grigsby* was dictated not by any DOE interpretation, but by "the mandate of the property definition itself." *Id.* at 178. Further, it found that "the controlling concept of Ruling 1975-15 [that the 'right to produce' rather than the ownership interest determines the 'property'] was implicit in the regulatory definition of 'property, '. . . ." *Id* at 170. Accordingly, TECA upheld Ruling 1975-15 on the basis of the language of the "property" definition. *Id.* at 179.

Thus, in *Grigsby* and *Pennzoil*, TECA developed out of the regulatory definition of "property" the clear and "controlling concept" that the "right to produce," which defines the "property," may originate with the lease or

fee interest, but may be further defined by contractual agreement or orders of state regulatory authorities. In so doing, it introduced order and coherence into an area which, under the DOE's administration, had been marked by confusion and uncertainty.

TECA's decision in the instant case, its third major "property" case, marked the return of confusion to this area of the law. Promisingly enough, the court began its opinion by acknowledging its earlier line of decision:

> Although the words "lease" and "fee" appear in the definition, the parties agree, and this court has held, that: "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citing *Grigsby*].

App. A at 14a. However, rather than looking to its own decisions as precedents or undertaking an independent analysis, TECA chose simply to defer to the DOE's August 1976 "finding" that

> "the literal meaning of the term 'property' . . . is generally to be understood as synonymous with the physical 'tract' or 'premises' as to which a working interest is established by an oil and gas lease, or by a fee interest" . . . "[T]here should have been no doubt but that CLC intended by its definition of property to signify the premises described by an oil and gas lease" as the property in the vast majority of instances.[18]

Id. at 15a (citations omitted). Following the DOE's lead rather than its own, the court refused to recognize as being within the "property" definition any "rights to pro-

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[18] The DOE's statement that "there should have been no doubt" as to the meaning of "property" is incomprehensible in light of both the admission of the FEA's Deputy Administrator that the meaning was unclear to the agency itself and the DOE's own conclusion in April 1976 that LOC units could be "properties" under the original definition.

duce" other than leases, fee interests and those expressly approved in Ruling 1975-15. *Id.* at 17a, 18a.

The court made no effort to reconcile its decision with its analysis in *Grigsby* that other sources of the "right to produce," such as "orders of state regulatory agencies," determine "properties." *See Grigsby*, 585 F.2d at 1083. Nor did the court even attempt to explain how the "right to produce" concept entailed that the Louisiana production units at issue in *Grigsby* were "properties" while those at issue here were not. Indeed, the court completely ignored the essential fact that in *Grigsby*, it found the "right to produce" in the LOC order that established the unit there at issue. Instead, the court gave absolutely no weight to the fact that the producing entities that petitioners sought to have declared "properties" in this case are products of the same State regulatory system and are established and recognized by the same State agency as the unit involved in *Grigsby*. Viewed from the perspective of the "right to produce," the units are indistinguishable.

By holding in *Grigsby* and *Pennzoil* that the "right to produce" is "obviously quite different in meaning than" the lease or fee interest, while, in the instant case, upholding the DOE's "general position that the lease defines the property," TECA has once again created tremendous confusion as to the meaning of "property." It is a given that the "right to produce" defines the "property." Yet TECA has no coherent concept of that right. In particular, various panels of that court have held that "orders of state regulatory authorities" do—and do not—define the "right to produce." These contradictory holdings represent a signal failure by that court to fulfill its mandate to provide "consistency of decision." Moreover, by refusing to rehear this case *en banc*, TECA has demonstrated that it will not reconcile its divergent decisions. *See* App. C. Because TECA is unwilling—or unable—to provide a clear and coherent understanding of the fundamental concept of "property," this Court should.

3. *The Temporary Emergency Court of Appeals' uncritical acceptance of the DOE's general "lease defines the property" interpretation has denied petitioners their right to meaningful judicial review.* TECA deferred, without analysis, to the DOE's "general position that the lease defines the property" on the sole ground that it found that position to be "reasonable." *See* App. A at 14a. In so doing, that court ignored the language of the definition whose interpretation was at issue. It ignored the prior inconsistent agency interpretations of that definition. It ignored the district court's findings that the DOE itself was confused as to the meaning of "property" and that the definition itself gave producers "no clue whatsoever" that reservoir-wide LOC units could not be treated as "properties." *See* App. E at 49a, 50a. It ignored the district court's finding that the treatment of reservoir-wide LOC units as "properties" was consistent with the objectives of the price control program. *See id.* at 48a. And it assigned no importance to the fact that the units involved in this case are established and recognized by the official act of a sovereign state, petitioner Louisiana.

The approach of the court below to judicial deference to agency interpretations offends even the accommodating standards of this Court's decision in *Skidmore.* In *Skidmore,* this Court, unlike TECA, recognized that deference to agency interpretations is not an absolute rule. 323 U.S. at 140. *Accord, Chrysler Corp.* v. *Brown,* 441 U.S. 281, 315 (1979). Rather, this Court held that the deference to be accorded an agency's interpretation depends on an analysis of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore,* 323 U.S. at 140. *Accord, General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141-42 (1976). TECA has subverted this standard by substituting deference for analysis, requiring nothing of the agency other than its *ipse dixit.* It has ignored this Court's admonition that "[t]he deference owed to an [administrative

agency] . . . cannot be allowed to slip into judicial inertia. . . ." *Volkswagenwerk* v. *Fed. Maritime Comm'n*, 390 U.S. 261, 272 (1968), *quoting American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

The considerable amount of time that passed before the DOE adopted the "property" interpretation at issue makes TECA's deference to that interpretation particularly inappropriate in this case. Deference is to be "based on such factors as the timing and consistency of the agency's position, ..." *Chrysler Corp.*, 441 U.S. at 315; *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). Here, TECA had before it an interpretation issued fully three years after the definition was announced and had to be applied; one year after the DOE first announced that the focus of the definition is on the "right to produce"; and only four months after the DOE indicated that it had not yet made up its mind as to the meaning of "property" and concluded that the very types of units at issue here were probably "properties." As the district court found:

> The DOE, itself, admitted in its hearings before a Congressional subcommittee that the property definition was ambiguous and unclear and that the meaning had not been clear to the agency. . . . Further, the DOE did not decide upon or publicly announce its interpretation of the property definition until the end of the relevant period; *i.e.*, until August, 1976.

App. E at 49a. Nonetheless, TECA found the interpretation to be "reasonable," and commented that there was no justification for petitioners to have thought otherwise. App. A at 14a, 20a. In short, TECA has held petitioners to a higher standard of knowledge than it has the agency.

This perverse result is made even worse by the fact that between the time of the DOE's interpretation and the time of the decision below, TECA decided *Grigsby* and *Pennzoil*. As shown, the holding of those cases with respect to the "right to produce" cannot be reconciled with the "lease defines the property" interpretation that the

DOE announced in August 1976 and that the court upheld in this case. It affronts the doctrine of judicial review for a reviewing court to give unquestioning deference to an agency interpretation that conflicts not only with the agency's own prior pronouncements, but with the prior interpretations of that court itself. Such a blatant failure to review, particularly in a case involving an issue of great importance and claims of nearly one billion dollars, should be corrected.

Congress has condemned the practice of uncritical deference by the courts it has charged with the responsibility to review agency action. The United States Senate has passed, and the House Judiciary Committee has favorably reported out, regulatory reform legislation amending, *inter alia*, the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 706(c).[14] The Senate version provides, in relevant part:

> In making determinations on other [*i.e.*, nonjurisdictional] questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

S. 1080, 97th Cong., 2d Sess. § 5(b) (1982). This provision is intended to reinstate the primacy of the standards for review established by this Court in *Skidmore*. In its report on this bill, the Senate Judiciary Committee deplored "certain instances" in which the doctrine of deference "is applied as a virtual presumption of correctness

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[14] S.1080, 97th Cong., 2d Sess., 128 Cong. Rec. S2713-21 (daily ed., March 24, 1982); H.R. 746, 97th Cong., 1st Sess., 127 Cong. Rec. H73 (daily ed., January 6, 1981); H.R. Rep. No. 435, 97th Cong., 2d Sess. (1982) (report of House Comm. on Judiciary).

of all interpretations of law by an agency." Rather, it stated,

> in examining an agency interpretation of law, the court should evaluate "the thoroughness exhibited [sic] in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.* 323 U.S. 134, 140 (1944). The court should also weigh any countervailing factors bearing on the validity of the agency's legal position.
>
> Accordingly, under this amendment, a reviewing court may not proceed on the assumption that it should uphold an agency's statutory construction merely because that construction is not unreasonable or not irrational.

S. Rep. No. 284, 97th Cong., 1st Sess. 165, 170, 171 (1981).

This Court should not tolerate such an abdication of the duty to review as manifested by TECA in this case. As TECA itself has acknowledged, "the final power of interpretation is in the courts." *Energy Reserves Group, Inc.* v. *Dep't of Energy*, 589 F.2d 1082, 1093 (Temp. Emer. Ct. App. 1978), *quoting* Davis, *Administrative Law Of The Seventies* § 5.03-1 at 152 (1976). As the only Court supervising TECA's review of important economic legislation and regulation, this Court should require at least a reasoned and coherent analysis. Such supervision is particularly appropriate in this case, which presents the opportunity to clarify the meaning of the most fundamental principle of those regulations, "property."

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

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No. 82-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
DONALD P. HODEL, Secretary of Energy,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1076

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
DONALD P. HODEL, Secretary of Energy,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of this Court, petitioners the State of Louisiana, Texaco Inc. and The Louisiana Land And Exploration Company submit this supplemental brief for the purpose of bringing to this Court's attention a new case not available at the time that petitioners filed their Petition For A Writ Of Certiorari on December 23, 1982. That decision, *Grigsby v. Dep't of Energy*, No. 5-81 (Temp. Emer. Ct. App.) (hereinafter "*Grigsby II*"), was decided by the Temporary Emergency Court of Appeals (hereinafter "TECA")

on January 18, 1983.[1] *Grigsby II* is TECA's decision on appeal from the decision of the trial court following TECA's remand of *Grigsby v. Dep't of Energy*, 585 F.2d 1069, *modified on rehearing*, 585 F.2d 1080 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979) (hereinafter "*Grigsby I*"), a case upon which petitioners principally rely in their Petition.

STATEMENT

In their Petition, petitioners have urged this Court to review the decision below because TECA, in rendering that decision, abrogated its duty to provide "consistency of decision" with respect to the meaning of "property," the most fundamental concept of an important federal regulatory system. Petition at 18-22. *Grigsby II* further highlights the inconsistency that has characterized TECA's decisions concerning that concept.

In *Grigsby I*, TECA held that an order of the Louisiana Office of Conservation establishing a crude oil production unit gave rise to the "right to produce" and thus created a "property." *See* Petition at 19. Thereafter, in *Pennzoil Co. v. Dep't of Energy*, 680 F.2d 156 (Temp. Emer. Ct. App. 1982), TECA reaffirmed the interpretation of "property" announced in *Grigsby I* that "'[t]he focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest.'" *See* Petition at 20. However, in the decision below, TECA upheld as "reasonable" the Department of Energy's "general position that the lease [not other 'rights to produce'] defines the property" and ignored its earlier recognition of the conclusive effect of orders of the Louisiana Office of Conservation in determining "properties" in Louisiana.

---

[1] The full text of TECA's decision in *Grigsby II* is set out at Appendix A hereto.

TECA's decision in *Grigsby II* underscores the confusion created by its decision below. Without mentioning its decision in the instant case, TECA reaffirmed its holding in *Grigsby I* that the order of the Louisiana Office of Conservation that established the unit there at issue created a "property":

> On rehearing, this Court held that production from Robert Leger Well No. 1 was entitled to be treated as "new" oil, on and after June 24, 1976. This result followed from the fact that official recognition and unitization as of that date by the Louisiana Office of Conservation (LOC) . . . . brought it within DOE's then definition of "separate property."
>
> • • • •
>
> [W]e believe the holdings in *Grigsby I* were and remain correct. The prior opinion . . . held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact.

App. A. at 3a. The court did not attempt to distinguish the decision below.

TECA's decision in *Grigsby II* confirms that "property" designations could properly be based on "unit classifications by the regulating state . . . ." In that case, as in this, the state concerned was Louisiana. App. A. at 2a. The decision below cannot be reconciled in principle with either this latest decision of TECA or with that court's earlier decisions in *Grigsby I* and *Pennzoil Co.*

The conflict between the decision below and TECA's other three decisions as to the meaning of "property" has created confusion and uncertainty on this important question of federal law. This Court should review TECA's failure to provide on that question the "consistency of decision" for which that court was established.

CONCLUSION

For the foregoing reasons, and for those set forth in their Petition, petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

/s/ Allan Abbot Tuttle

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February 17, 1983

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-81

JACK W. GRIGSBY,
Plaintiff-Appellant,

vs.

DEPARTMENT OF ENERGY and JAMES EDWARDS,
Secretary of Energy,
Defendants-Appellees,

and

THE UNITED STATES OF AMERICA,
Counterclaimant-Appellee.

On Appeal from The United States District Court
Western District of Louisiana
(Civil Action No. 770258-S)

Argued: January 7, 1983 Decided: January 18, 1983

H. H. HILLYER, JR., with whom J. Henry Phillips III of the same firm, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, Louisiana; and Marlin Risinger, Jr. and W. Michael Adams, of the firm, Blanchard, Walker, O'Quin & Roberts, Shreveport, Louisiana, of counsel, were on the brief for the Appellant.

BARBARA WARD, Department of Justice, Washington, D.C., with whom J. Paul McGrath, Assistant Attorney General, and Dennis G. Linder of the same agency; and Daniel F. Shea and Larry Ellsworth, of Counsel, Department of Energy, Washington, D.C., were on the brief for the Appellees.

Before BROWN, HEMPHILL and POINTER, Judges.

PER CURIAM:

This case has been before this Court on appeal once before in *Grigsby v. DOE*, 585 F.2d 1069, opinion on rehearing at 585 F.2d 1080 (TECA 1978), which will be referred hereafter as *Grigsby I*. The salient facts are stated there and need not be repeated. On rehearing, this Court held that the production from Robert Leger Well No. 1 was entitled to be treated as "new" oil, on and after June 24, 1976. This result followed from the fact that official recognition and unitization as of that date by the Louisiana Office of Conservation (LOC) of the Upper Heywood "A" Sand, Reservoir A, Sand Unit B (Upper Heywood), as a unit separate from the Heywood Sand, Reservoir A, Sand Unit B (Heywood), brought it within DOE's then definition of "separate property." However, the matter was remanded to the trial court for trial on a disputed material factual issue. That issue was whether the Upper Heywood A reservoir had been treated as part of the same unit which covered the Heywood reservoir prior to June 24, 1976, or whether it had been treated as a separate unit before that date. On remand, appellant was unable to carry his burden to show separate unit treatment of the Upper Heywood Reservoir A, as found by the district court. Consequently, the Robert Leger Well No. 1 production before June 24, 1976 should have been priced as "old" oil by appellant.

A close examination of this appeal reveals that appellant does not seek review of any error made by the district court except insofar as the district court complied with this Court's directions on remand. Appellant actually seeks review of the decision by this Court in *Grigsby I*, claiming that the instructions therein to the trial court were erroneous. The prior holdings of this Court are the law of this case, and were properly followed by the district court.

More importantly, we believe the holdings in *Grigsby I* were and remain correct. The prior opinion stated that the need for certainty and finality in the enforcement of price control regulations militated against retroactive application of the LOC's subsequent separate unitization and held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact.

Grigsby I provided appellant with an opportunity, albeit limited, to establish that the Robert Leger Well No. 1 had been treated as a separate property prior to the state's reclassification, but appellant was unable to do this on remand.

For the foregoing reasons, the decision appealed from is AFFIRMED.

82-1076

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, Secretary of Energy,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-65

DEPARTMENT OF ENERGY and JAMES B. EDWARDS,
Secretary of Energy,
Defendants-Appellants,

—against—

STATE OF LOUISIANA,
Plaintiff-Appellee,

TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Plaintiffs-Intervenors-Appellees.

(And Consolidated Case No. 5-66)

Appeal from the United States District Court
for the Western District of Louisiana

(Civil Action No. 80-0812)

(Argued: May 14, 1982 Decided: September 17, 1982)

Judgment Entered: October 4, 1982

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Before METZNER, BECKER and HEMPHILL, Judges

METZNER, Judge.

The Department of Energy (DOE) appeals from two orders of the District Court for the Western District of Louisiana.[1] The first order denied DOE's motions to dismiss the complaint and to vacate intervention orders. The second order granted the summary judgment motion of the State of Louisiana (plaintiff-appellee) and Texaco, Inc. and Louisiana Land and Exploration Company (plaintiffs-intervenors-appellees). The issues raised by DOE on these appeals concern exhaustion of administrative remedies, ripeness, standing, intervention and the propriety of the disposition on the merits by granting summary judgment to the appellees.

---

[1] *State of Louisiana v. Department of Energy*, 507 F. Supp. 1365 (W.D. La. 1981); 519 F. Supp. 351 (W.D. La. 1981).

The dispute between the parties arises out of a DOE enforcement proceeding in which DOE claims that Texaco improperly sold domestically produced crude oil to its customers as new oil when the oil should have been classified as old oil which has a lower maximum price fixed by the regulations. Texaco is charged with having exceeded the authorized price for the period August 19, 1973 to September 1, 1976, by more than $748,000,000.

The State of Louisiana is involved in this litigation because it has collected severance taxes and royalties on oil rights from lessees of state owned land based on the classification of this oil as new oil. The Louisiana Land and Exploration Company (LL&E) is a private enterprise which has royalty interests and working interests in properties in which Texaco has a working interest.

The litigation commenced in the District Court of Delaware in 1979 when Texaco, as plaintiff, and the State of Louisiana and LL&E as intervenors, sought declaratory relief as to the meaning and validity of certain regulations and rulings of DOE. They also sought injunctive relief as to the aforementioned pending DOE enforcement proceeding against Texaco.

Specifically, plaintiffs sought a determination that multiple producing reservoirs operated by Texaco and LL&E and recognized by the Louisiana Office of Conservation (LOC) as separate producing units be treated as separate properties under DOE regulations for determining old and new oil even though they may be located on a single premises. The court dismissed the complaints of Texaco and LL&E as not ripe for judicial review. *Texaco, Inc. v. DOE*, 490 F. Supp. 874 (D. Del. 1980). Thereafter, Louisiana filed a voluntary dismissal of its action disposing of that case.

Louisiana then instituted this action in the Western District of Louisiana where the court granted Texaco and

LL&E leave to intervene. The relief sought by the amended complaint in this action is a declaration that reservoir-wide producing units established and recognized by Louisiana (LOC units) are separate properties for the purpose of federal oil and gas pricing regulation. A finding to this effect would classify the oil as new oil, and Texaco would not be liable to a claim for overcharges as to such oil.

I.

REGULATORY BACKGROUND

The Meaning of "Property" under the Federal Price Control System

The two-tier pricing system for crude oil was promulgated by the Cost of Living Council (CLC) on August 17, 1973, under authority of the Economic Stabilization Act of 1970. 38 Fed. Reg. 22536 (August 22, 1973). Congress reaffirmed this authority with the enactment of the Emergency Petroleum Allocation Act (EPAA). Pub. L. 93-159; 15 U.S.C. § 751 *et seq.*

CLC established two categories of domestically produced crude oil: old oil, which was subject to a price ceiling, and new oil, which could be sold at a higher free market price. For each "property" operated by a given producer, the classification of the oil was calculated monthly. The amount of oil produced from the property in the corresponding month of 1972 was the benchmark for classifying current production. Production less than the benchmark was old oil. Production in excess of the benchmark was new oil.

Because the two-tier system was thus based on a property-by-property comparison of current production with 1972 production, the definition of the term "property" was of fundamental importance. The CLC definition, however, was rudimentary:

> " 'Property' is the right which arises from a lease or from a fee interest to produce domestic crude petroleum."

6 C.F.R. § 150.354, as amended 38 Fed. Reg. at 22538 (1973).

By September 1975, the Federal Energy Administration (FEA) had taken over the administration of the pricing system and issued the first interpretation of the property definition. In Ruling 1975-15 (40 Fed. Reg. 40832 (September 4, 1975)), the FEA addressed the question of how property designations should be made where several geologically distinct producing reservoirs were contained within the boundaries of a single leased tract. The agency stated that for purposes of the price regulations, "the property concept is one that identifies the right to produce crude oil, whether that right arises from a lease or from a fee interest." *Id.* Since the "right to produce" was the proper basis for making property designations, geological considerations such as reservoir boundaries were irrelevant.

On December 22, 1975, the Energy Policy and Conservation Act (EPCA) was enacted as an amendment to EPAA. Pub. L. 94-163. This legislation contemplated revisions to optimize production from domestic properties subject to a statutory maximum weighted average first sale price of $7.66 per barrel. The President had to determine that any departure from the then current controls would be likely to result in greater production from such properties. EPCA § 401, 15 U.S.C. § 757.

On August 20, 1976, FEA amended the property definition as part of an overhaul of the regulations pursuant to the EPCA. The original definition of property was continued with the following addition:

> "A producer may treat as a separate property each separate and distinct producing reservoir sub-

> ject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation."

41 Fed. Reg. 36172, 36184 (August 26, 1976); effective September 1, 1976. The FEA stated that the amended definition of property comports with the objective provided in EPCA that producers are provided with an incentive "to develop new deep reservoirs which would result in all new crude oil production." Moreover, it "removes the disincentive some producers faced with respect to properties where declining production from existing reservoirs offset new production from other reservoirs which would otherwise have qualified for treatment as new crude oil." *Id.* at 36179.

In the preamble to this amendment, FEA made it clear that reservoir-by-reservoir property designations would not, in general, be accepted as a basis for calculating quantities of old and new oil produced prior to September 1. Such an interpretation of the old property definition was, in FEA's view, "expansive" and "unwarranted," and the agency concluded that retroactive ratification of property designations based on this interpretation would be unfair to those producers who had "adhered closely to the regulations." *Id.* at 36177. Thus, the new property definition would have prospective effect only and the validity of property designations before September 1976 would be determined by reference to the old definition. Further, in interpreting the old definition, the preamble sets forth in detail certain circumstances under which a leased premises might permissibly have been subdivided into several federal properties. *Id.* at 36176-77. State recognition of geologically distinct reservoirs is not one of the circumstances listed.

FEA reissued the text of the August 20 preamble as Ruling 1977-1. 42 Fed. Reg. 3628, 3629 (January 19, 1977). Six days later, FEA issued Ruling 1977-2, which reaffirmed the policy adopted in Ruling 1977-1 and set forth certain clarifications not relevant here. 42 Fed. Reg. 4409 (January 25, 1977). Although the agency policy here in question was originally enunciated in the August 20, 1976, preamble, the plaintiffs attack the 1977 rulings because the validity of the regulation is not being challenged.

Texaco's Property Designations

Like many other states, Louisiana regulates the production of petroleum within its borders. Its purpose is conservation. As part of the regulatory scheme, LOC "for the prevention of waste and to avoid the drilling of unnecessary wells [establishes] a drilling unit or units for each [reservoir]." La. Rev. Stat. Ann. 30:9(B). Thus, a LOC unit never encompasses more than a single reservoir.

In making property designations for the purpose of the two-tier pricing system, Texaco frequently chose to designate reservoir-wide LOC production units as separate properties, even though more than one unit may be found within the confines of a single leased tract. Plaintiffs challenge the validity of Rulings 1977-1 and 1977-2 insofar as they would preclude such designations prior to September 1, 1976. DOE claims that these LOC units are not to be considered as separate properties before that date.

II.

This court will first address the issues raised on the appeal from the denial of DOE's motion to dismiss (507 F. Supp. 1365). These issues are failure to exhaust administrative remedies, ripeness, standing and intervention.

Exhaustion

DOE claims plaintiffs' action was not properly before the district court because plaintiffs have yet to exhaust administrative remedies.

It urges that the administrative proceedings at issue in this case will determine whether pricing regulations have been violated. Upon completion of these proceedings, DOE's Office of Hearings and Appeals may issue a Remedial Order (RO). 10 C.F.R. § 205.199(B). Section 503(c) of the Department of Energy Organization Act provides that an RO shall be reviewable in a hearing on the merits before the Federal Energy Regulatory Commission. 42 U.S.C. § 7193(c), 10 C.F.R. § 205.199(C). DOE further contends it is the final FERC order which constitutes the "final agency action" from which judicial review may be sought. While Section 503(c) is often asserted to preclude review prior to final agency action, it is clear that the section is inapplicable to the case at hand.

As stated earlier, plaintiffs challenge the facial validity of FEA Rulings 1977-1 and 1977-2, upon which the DOE enforcement proceeding is predicated. There is no administrative appeal from a ruling. 10 C.F.R. § 205.154. The statutory exhaustion requirement of Section 503(c) does not apply to such challenges. Despite DOE's contentions to the contrary, the court below was correct in finding that plaintiffs challenge the interpretation rather than the enforcement proceeding.

The exhaustion doctrine, asserted in numerous other actions involving DOE,[2] requires that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been ex-

[2] *See, Pennzoil Co. v. DOE*, 466 F. Supp. 238 (D. Del. 1979); *Northern Natural Gas Co. v. DOE*, 464 F. Supp. 1145 (D. Del. 1979); *Phillips Petroleum Co. v. Federal Energy Administration*, 435 F. Supp. 1239 (D. Del. 1977), *aff'd sub nom. Standard Oil Co. v. DOE*, 596 F.2d 1029 (TECA 1978).

hausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). However, this doctrine is subject to numerous exceptions. *See, McKart v. United States*, 395 U.S. 185, 193-195 (1969). For example, among the exceptions are proceedings where the issues sought to be litigated are purely legal and where the agency has either taken a final position with respect to such issues or will not address them during the compliance proceeding. *See, e.g., Pennzoil v. DOE, supra* note 2 at 243-244; *Phillips Petroleum Co. v. Federal Energy Administration, supra* note 2 at 1248.

DOE, in this case, has made it clear it will not consider the validity of the challenged rulings at a subsequent stage of the compliance process. Counsel for DOE made such representation at oral argument before this court. This fact distinguishes this case from several recent TECA decisions in which the complaints were dismissed for failure to exhaust. *See, National Distillers and Chemical Corp. v. DOE*, 662 F.2d 754, 756 (TECA 1981); *Missouri Terminal Co. v. Edwards*, 659 F.2d 139, 145 (TECA 1981); *Hawthorne Oil & Gas Corp. v. DOE*, 647 F.2d 1107, 1114 (TECA 1981). Thus, the district court's consideration of plaintiffs' legal claims did not violate the doctrine of exhaustion, as the challenged rulings are, in fact, "final agency action."

Ripeness

DOE argues the district court should not have considered plaintiffs' claims because they were not ripe for judicial review. The test for ripeness in the pre-enforcement review context, which DOE asserts plaintiffs have not met, requires a finding that the following four factors be satisfied:

(1) the issues presented are purely legal,

(2) the issues arise out of final agency action,

(3) the controversy has a direct and immediate impact on plaintiffs' business, and

(4) litigation of the controversy will expedite final resolution of the matter rather than delay or impede effective agency enforcement efforts.

Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967); *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967); *Bankers Life & Cas. Co. v. Callaway*, 530 F.2d 625 (5th Cir. 1976); *Pennzoil Company v. DOE*, *supra* note 2; *Phillips Petroleum Co. v. Federal Energy Administration*, *supra* note 2.

Having determined that there has been "final agency action," this court need not further discuss the first two elements of the test.

In regard to the expedition/delay issue, this court looks to the case of *Northern Natural Gas Co.*, *supra* note 2, which held:

> "If the plaintiffs ultimately prevail here, the need for an agency enforcement action will be narrowed substantially, and possibly eliminated. If DOE prevails here, the judgment against the plaintiffs will be binding upon them in any other proceeding. While DOE contends that the plaintiffs must first challenge the regulations in an agency enforcement action, it has not suggested any cogent reasons why that procedure would be more efficient, or why this action will delay or impede any action it desires to institute."

464 F. Supp. at 1155. *Accord*, *Pennzoil*, *supra* note 2; *Dow Chemical U.S.A. v. Consumer Product Safety Comm'n*, 459 F. Supp. 378, 387 (W.D. La. 1978). Thus, it is clear that the court below correctly concluded the fourth element had been satisfied.

We now address the question of whether this controversy has a direct, immediate impact upon plaintiffs;

considering first, whether Louisiana, as plaintiff, has satisfied this element. Louisiana's interest in this litigation lies in its status as a sovereign and as a landowner. As a sovereign, it receives a severance tax based on the price at which oil and gas produced within the state are first sold or transferred; as a landowner, Louisiana leases its lands to producers and receives a royalty based on the price at which oil and gas are first sold or transferred.

Operating throughout the State of Louisiana are producers, other than Texaco, which make royalty and severance tax payments to Louisiana. These producers have acceded to the views they believe are expressed in Rulings 1975-15, 1977-1 and 1977-2, and have refunded the overcharges resulting from their earlier treatment of multiple LOC's located on a single premises as multiple properties. Consequently, Louisiana has received claims for refunds of corresponding amounts of royalties and severance tax payments.

Louisiana's only remedy, outside of immediate resolution of the "property" controversy, is to defend the numerous claims being made for refunds. This is precisely the situation found in *State of Florida v. Weinberger*, 492 F.2d 488, 492 (5th Cir. 1974), where Florida had to choose between undertaking "likely financial outlay and certain legislative and administrative effort," or undergoing the "risk [of] the at least temporary loss of funding which a conformity hearing . . . could well produce."

Thus, Louisiana is not merely a complainant whose rights are affected only on the contingency of future administrative action. *See, Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942). The trial court correctly held Louisiana faced sufficient hardship to be properly before the court.

Standing

DOE claims that Louisiana lacks standing to maintain this action.

In order to overcome this contention, Louisiana has to show that it has suffered injury in fact and that its interests are within the zone of interests to be regulated by regulations and rulings under consideration. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).[3] It is clear that Louisiana has met both parts of the test.

As indicated above, Louisiana is suing both as a sovereign and as a landowner. In both capacities it will lose revenues if the position of DOE is sustained. DOE has stated that it will maintain its present position as to the interpretation which it urges upon the court. The issue of the correct interpretation will not be resolved in the compliance proceedings. Louisiana is faced with refunding royalties and severance tax payments already made if the position with DOE is sustained. Finally, Louisiana clearly meets the zone of interest test as a landowner.

Intervention

The court below permitted intervention by Texaco and LL&E as of right under Rule 24(a) of the Federal Rules of Civil Procedure. The pertinent part of that rule provides in subparagraph (2) that intervention as of right is granted:

> "(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest,

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[3] There is serious question as to whether the Supreme Court has abandoned the zone test. *See*, K. Davis, *Administrative Law Treatise* § 22.02-11 (Supp. 1982).

unless the applicant's interest is adequately represented by existing parties."

It may be argued that the interests of Texaco and LL&E are adequately represented by the State of Louisiana. On the other hand, there is force to the argument that Texaco, faced with a claim of overcharge amounting to some $748,000,000 should not be compelled to have someone else represent its interest. However, it is not necessary to decide this point.

We find that there is adequate basis to permit intervention pursuant to Rule 24(b). There is no doubt that the claims of Texaco and LL&E and the main action have a common question of law, and that is all that the court has before it. Their intervention has not and will not delay or prejudice the adjudication of Louisiana and DOE's rights in the main controversy.

With intervention being properly allowed, we need not reach the issues as to the intervenors of ripeness, exhaustion of administrative remedies or the res adjudicata effect to be given to the decision of the Delaware District Court in *Texaco, Inc. v. DOE*, 490 F. Supp. 874 (D. Del. 1980).

III.

SUMMARY JUDGMENT

The court below granted plaintiffs' motion for summary judgment which challenged the validity of Rulings 1977-1 and 1977-2 on two grounds. First, plaintiffs contend that FEA's failure to recognize reservoir-wide LOC production units as separate "properties" per se is an unreasonable interpretation of the property definition promulgated by the CLC in 1973. Second, plaintiffs contend—and the district court held—that they are entitled to summary judgment because their interpretation was reasonable in a period of agency confusion during which the only indicia of agency policy were contrary to the

policy ultimately adopted, and the interpretation was abandoned prospectively at the same time it was imposed retroactively. We disagree with plaintiffs' contentions and reverse the order below.

Reasonableness of FEA's Interpretation

As we have already pointed out, the basic building block of the two-tier system for pricing old and new oil is the property concept. CLC's 1973 definition of "property" is "the right which arises from a lease or from a fee interest to produce crude petroleum."

Although the words "lease" and "fee" appear in the definition, the parties agree, and this court has held, that: "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." *Grigsby v. Department of Energy*, 585 F.2d 1069, 1083 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979). As pointed out in *Grigsby* at 1083 n. k, "the FEA has never stated that 'property' is always defined by the lease."

Absent extraordinary circumstances, the court will defer to an agency's interpretation of the meaning of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 17 (1965), quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). Under this standard of review, we find that Rulings 1977-1 and 1977-2 are reasonable insofar as they refuse to sanction the treatment of reservoir-wide LOC production units as separate properties.

When CLC created the two-tier pricing system in August 1973, it was seeking to "strike a balance" between the policy of restraining price increases and that of stimulating increased domestic production of crude oil. CLC Press Release, Aug. 10, 1973 (quoted in Ruling 1977-1, 42 Fed. Reg. 3628, 3630 (Jan. 19, 1977)).

Three months after the program was established, EPAA was enacted. Congress directed that the price control and allocation system be continued and reaffirmed the dual objectives of the pricing system. "Most importantly, the President must, in exercising this authority, strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of [oil] and of holding down spiraling consumer costs." H. Conf. Rep. No. 93-628, reprinted in [1973] U.S. Code Cong. & Ad. News 2688, 2703.

It was FEA's responsibility, in interpreting the 1973 property definition, to reconcile these "sometimes conflicting needs." FEA might rationally have chosen either to rely on the property interest or on concepts of state regulation in clarifying the meaning of the "right to produce." It chose the former.

Its analysis, set forth in Ruling 1977-1, begins with the finding "that the literal meaning of the term 'property' . . . is generally to be understood as synonymous with the physical 'tract' or 'premises' as to which a working interest is established by an oil and gas lease, or by a fee interest." 42 Fed. Reg. at 3631. The agency pointed out that: "Inasmuch as the lease is the basic document of the oil and gas industry, there should have been no doubt but that CLC intended by its definition of property to signify the premises described by an oil and gas lease" as the property in the vast majority of instances. 42 Fed. Reg. at 3632. Finally, this Ruling confirms what the agency had said two years before in Interpretive Ruling 1975-15 to the effect that separate reservoirs under a single lease constitute a single unit. 40 Fed. Reg. 40832, 40833 subsection F.

The agency has been consistent in this interpretation even though during 1976 it indicated the possibility that it might change its mind and adopt the definition contended for by the appellees here. On two occasions it

offered a proposed new rule for comment. 41 Fed. Reg. 1564, 1571 (Jan. 8, 1976); 41 Fed. Reg. 16179, 16180 (April 16, 1976). After considering the comments received and giving the matter further thought, the agency rejected the proposals. 41 Fed. Reg. 4931, 4938-39 (Feb. 3, 1976); 41 Fed. Reg. 36172 (Aug. 26, 1976). The amended regulations were adopted effective September 1, 1976. They continued the prior definition of property up to September 1976 but changed the definition for the future. This was not an admission that the original definition and its interpretations were wrong or vague. It merely signified the determination of the agency that in the future the LOC unit designation would better achieve the goal of the pricing system to find new oil.

The preamble to the amended regulations stated that they were promulgated pursuant to EPCA. Section 401 of that act mandated revisions in the price control program to optimize domestic production while maintaining an initial weighted average first sale price for domestically produced oil not in excess of $7.66 per barrel. 15 U.S.C. § 757. See also S. Conf. Rep. 94-516, pp. 190-91, reprinted in [1975] U.S. Code Cong. & Ad. News 1956, 2031-33. FEA explicitly found that the amendment to the property definition would offer the industry greater incentive to increase exploration and production and thus determined that the amendment would further the policy enunciated by Congress. 41 Fed. Reg. 36172, 36178-79 (Aug. 26, 1976).

We find this analysis reasonable and its results to be consistent with the property definition and the policies underlying the two-tier pricing system. While Texaco in fact may have been uncertain as to whether designation of reservoir-wide LOC production units as separate properties was unwarranted, their confusion does not require this court to overturn an administrative interpretation of a regulation which is not clearly erroneous. *Energy Consumers and Producers Association v. DOE,*

632 F.2d 129, 142 (TECA), *cert. denied*, 449 U.S. 832 (1980); *Udall v. Tallman, supra.*

Plaintiffs rely heavily on *Grigsby v. DOE, supra*, for the proposition that a LOC production unit constitutes a property for EPAA purposes, as a matter of law. But this case is not apposite.

Grigsby was concerned with a portion of Ruling 1975-15 which is not pertinent here. The case addressed an entirely different question: how to adjust property designations after a "unitization" by the state of Louisiana. The state in 1969 had ordered that five separately owned tracts and leases be pooled into a single production operation. It is not uncommon for operators of two or more adjoining leases producing from the same reservoir to pool their interests, surrendering their individual rights to produce to a single operator in return for a share of the total production. This often occurs after the reservoir has reached the declining stages of production and is usually accompanied by the introduction of enhanced recovery techniques. The operator coordinates production from the constituent leases, shutting in some wells and converting other previously producing wells into injection wells. 40 Fed. Reg. at 40832. In Louisiana, such an aggregation of leases is recognized by the LOC as a discrete production unit.

The realignment of the pattern of production would have played havoc with the federal pricing system had FEA permitted lease-by-lease property designations to continue in force after a unitization. It would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases, while other leases would be producing less or not at all. It would have permitted an operator to gerrymander production patterns by shifting producing wells from one lease to another.

Ruling 1975-15 dealt with this problem by declaring, *inter alia*, that the entire unitized premises constituted

the property for federal price control purposes. In *Grigsby*, the court upheld this interpretation as applied to a group of leases in Louisiana which had been unitized by LOC order. A more recent decision by this court has reaffirmed the rule that where the issue is unitization pursuant to a LOC-type order, the unit is the "property." *Pennzoil Co. v. DOE*, 680 F.2d 156 (TECA 1982). The Court specifically indicated that it was not considering the issue presented here. 680 F.2d at 178 n. 42.

We find no inconsistency in our determination in this case with the holding in *Grigsby* or *Pennzoil* in the light of the issues presented. There is no invitation to gerrymander where several reservoir-wide production units are within a single lease, and therefore, there was no reason for FEA in this setting to depart from its general position that the lease defines the property.

Standard Oil Doctrine

Citing our decision in *Standard Oil Co. v. DOE*, 596 F.2d 1029 (TECA 1978), the court below held that FEA's interpretation of the property definition was not to be given preference over the plaintiffs' reasonable interpretation because deference to a retroactive agency interpretation is not warranted when the agency's interpretation, though reasonable is not compelled. 519 F. Supp. at 353. A similar argument was made by the oil producer in *Pennzoil*, *supra*. Judge Christensen carefully analyzed the *Standard Oil* doctrine and found it inapplicable in that case. We find that the doctrine is similarly inapplicable here for the very same reasons so cogently expressed by Judge Christensen, and rest on that opinion without further explication.

However, we would make one additional observation to support our conclusion. The wording of Ruling 1975-15 put the plaintiffs on notice that multiple reservoirs in a single lease or fee ownership would not be considered

as separate properties even though they were separate LOC units for state purposes. More specifically, the ruling stated:

> "While the FEA recognizes that various state and other federal regulatory authorities may, for other purposes, have monitored production levels on other bases (*e.g.*, by physical boundaries or by producing formations or reservoirs), it is necessary that the price regulations embody a uniform concept, the parameters of which can be readily applied to all domestic production, regardless of varying state classifications. For this reason, FEA regulations utilize, as a reference, a property concept, based upon the right to produce crude oil, that can be readily identified for all producers.
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> . . . .
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> . . . In the majority of cases, involving only one lease that remains unchanged since 1972, a producer will simply compare his current monthly production for the property (the lease in those cases) against the corresponding monthly production for the lease in 1972."

40 Fed. Reg. 40832 (September 4, 1975).

The ruling concluded by stating:

> "F. *Production From More Than One Reservoir on a Single Property.* Because the property concept is based upon the right to produce crude oil, whether arising from a lease or from a fee interest, the existence of two or more separate and distinct reservoirs will not in itself create two or more separate 'properties'. Therefore . . . where a producer holds a single right to produce crude oil from two or more reservoirs, together the two or more reservoirs constitute a single property; where there are separate

> and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property."

Id. at 40833.

There is nothing confusing in this wording as applied to our specific problem. Plaintiffs knew that they were using a different interpretation in determining whether the oil being produced was old or new. They never sought an agency interpretation to sustain their position. Rather, they seem to have proceeded on the theory that their interpretation was reasonable and that it would afford them protection against such a claim as now being made by DOE. This, of course, is no defense. The history of the regulations, rulings and interpretations demonstrates that there was no justification for their position.

The order permitting Texaco and LL&E to intervene and finding that plaintiffs are not precluded from maintaining this action by reason of failure to exhaust administrative remedies, lack of ripeness or standing to sue, is affirmed. The order granting summary judgment to appellees is reversed and summary judgment is directed to be entered for appellants.

So ordered.

APPENDIX B

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-65

DEPARTMENT OF ENERGY, *et al.*,
Plaintiff-Appellee,
v.
STATE OF LOUISIANA,
Plaintiff-Appellee,
and
TEXACO, INC., *et al.*,
Plaintiffs-Intervenors-Appellees.

Before METZNER, BECKER and HEMPHILL, Judges.

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the Western District of Louisiana, and was argued by counsel.

In consideration whereof, IT IS ORDERED that the order permitting Texaco and LL&E to intervene and finding that plaintiffs are not precluded from maintaining this action by reason of failure to exhaust administrative remedies, lack of ripeness or standing to sue, is affirmed. The order granting summary judgment to appellees is reversed and summary judgment is directed to be entered for appellants.

FOR THE COURT

DONNA M. BOLD
Clerk

by: /s/ Andrew R. McCorkle
ANDREW R. MCCORKLE
Deputy Clerk

October 4, 1982

(District Court No. 80-0812)

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-65

DEPARTMENT OF ENERGY and JAMES B. EDWARDS, Secretary of Energy,
Defendants-Appellants,

v.

STATE OF LOUISIANA,
Plaintiff-Appellee,

TEXACO, INC. and

THE LOUISIANA LAND AND EXPLORATION COMPANY,
Plaintiff-Intervenors-Appellees.

Before METZNER, BECKER and HEMPHILL, Judges.

ORDER

Upon consideration of Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc*,

IT IS HEREBY ORDERED that said petition and suggestion are DENIED. The Mandate is to issue December 3, 1982.

FOR THE COURT

DONNA M. BOLD
Clerk

by: /s/ Andrew R. McCorkle
ANDREW R. MCCORKLE
Deputy Clerk

November 26, 1982

APPENDIX D

UNITED STATES DISTRICT COURT
W. D. LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civ. A. No. 800812

STATE OF LOUISIANA,
Plaintiff,

TEXACO, INC., THE LOUISIANA LAND AND EXPLORATION COMPANY,
Intervening Plaintiffs,

v.

DEPARTMENT OF ENERGY AND CHARLES W. DUNCAN, JR., *Secretary of Energy,*
Defendants.

Feb. 20, 1981

MEMORANDUM OPINION

SHAW, District Judge.

Originally, plaintiff, State of Louisiana, petitioned this Court to declare that oil and gas production units that are established and recognized by Louisiana's Office of Conservation ("LOC") constitute separate "properties" under federal oil and gas pricing regulations. Plaintiff further requested this Court to enjoin defendants, the Department of Energy and Charles W. Duncan, Jr., Secretary of Energy, ("DOE"),[1] from proceeding adminis-

[1] As used herein, "DOE" will sometimes refer to the Department of Energy and its predecessor agencies, including the Federal Energy Administration ("FEA") and the Federal Energy Office ("FEO"), collectively, as well as to defendant, Charles W. Duncan, Jr., Secretary of Energy. On February 4, 1981, James B. Edwards,

tratively or judically against producers of oil within the State on the erroneous theory that such units are not separate "properties".

On January 30, 1981, plaintiff filed an amended complaint, waiving its broader claim that all LOC units constitute separate "properties" and requested that the Court declare: (1) that at all times since August, 1973, reservoir-wide producing units established and recognized by Louisiana have been separate "properties" for the purpose of federal oil and gas pricing regulations; (2) that Louisiana and producers could properly have treated such units as "properties"; (3) that certain federal rulings, to the extent they purport to preclude the designation of reservoir-wide production units established by Louisiana as separate properties, are invalid, null and void, or alternatively, are not the only valid interpretation of the definition of property and therefore, cannot be applied retroactively; and, (4) for costs and various injunctive relief.

DOE, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, has moved to dismiss the complaints filed herein by the State of Louisiana on the grounds that this Court lacks jurisdiction because:

1. The plaintiff lacks standing to maintain this action;

2. The claims asserted in the complaint are not ripe for judicial review and do not present a justiciable case or controversy;
and,

3. The plaintiff has failed to exhaust its administrative remedies.

DOE also moved this Court to vacate its orders granting Texaco, Inc. ("Texaco") and the Louisiana Land and Exploration Company ("LL&E") permission to intervene

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Secretary of Energy, and successor in office to Charles W. Duncan, Jr., was substituted as defendant in place of Charles W. Duncan.

on the ground that the Court lacks jurisdiction under Rule 24(a) of the Federal Rules of Civil Procedure.

Background Facts

On July 19, 1973, the Cost of Living Council ("CLC") proposed a "two-tier" pricing system for crude oil to become effective on August 19, 1973.

The two-tier system was designed to achieve two goals simultaneously. It was to control inflation by limiting the price of oil then being produced to an established "ceiling price". At the same time, it would stimulate increased production by allowing newly discovered crude oil to be sold at a higher free-market price.

Basically, the two-tier system requires producers to determine, on a property-by-property basis, the portion of their crude oil production that must be sold at the lower tier price, and the portion eligible to be sold at the upper tier price. These determinations are made by comparing each property's current monthly production with the property's historic monthly production, designated as the "Base Production Control Level" ("BPCL"). The portion of current production from each property equal to, or less than, the BPCL must be sold at the lower tier ceiling price, and that portion that exceeds the BPCL may be sold at the upper tier ceiling price.

Therefore, oil produced from currently producing "properties" was "old oil" subject to the ceiling price. Increased production from existing "properties" and production from newly-discovered "properties" could be sold at a higher, uncontrolled price. The basic building block of the two-tier system was the "property" concept. In its August, 1973 notice, CLC defined "property" as follows:

> "Property" is the right which arises from a lease or from a fee interest to produce domestic crude petroleum. (38 Fed.Reg. 22536, 22538 (August 22, 1973))

That definition was codified at 6 C.F.R. § 150.354.

Numerous producers, including the intervenors in this case, construed this regulation to permit them to treat their various LOC units as separate "properties".[2]

DOE, however, remained silent as to the interpretation and application of that most basic concept for almost two years. Its first elaboration of the definition occurred in FEA Ruling 1975-15 announced on August 29, 1975. That ruling indicated that FEA, the predecessor of DOE, considered the "right to produce" to be the core concept of the "property" definition:

> For purposes of the price regulations then, the property concept is one that identifies the right to produce crude oil, whether that right arises from a lease or from a fee interest. (40 Fed.Reg. 40832 (September 4, 1975))

On April 13, 1976, FEA issued a notice of proposed rulemaking designed, among other things, to clarify the "property" concept further. In this notice, FEA proposed to elaborate Ruling 1975-15's recognition "that the lease or fee interest does not in every instance suffice to describe the producing entity, and, therefore, may not be adequate to describe the property." 41 Fed.Reg. 16179, 16180 (April 16, 1976) FEA observed that:

> (W)hen the right to produce crude oil, although arising from several lease or fee interests, is more

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[2] It is the contention of plaintiff and intervenors herein that a crude oil producer, following the promulgation of the original property definition in 1973, could have reasonably and lawfully interpreted the definition of property at 10 C.F.R. § 212.72 to permit the designation as a separate "property" of any less-than-leasehold interest, where such property designation is based upon *either*:

a. the recognition of an oil or gas production unit by the LOC;

b. the existence of separate and distinct pools or reservoirs within a lease or fee interest;

c. the accounting for, and payment of, royalty fees; *or*,

d. the calculation and payment of severance tax payments.

> correctly described by the unit, it is appropriate for the FEA to recognize the same producing entity as the property for purposes of determining lower and upper tier quantities.

FEA acknowledged the desirability of conforming its "property" definition to historical state regulatory concepts:

> (T)he pre-existing regulatory concepts, of state regulatory agencies and historical systems of production accounting that transcend the variations among state regulatory requirements ought to be afforded the maximum practicable significance under FEA regulations. (*Id.*)

It noted that these historical practices would modify a right to produce:

> Broadly stated, then, the right to produce crude oil may be described in the first instance by a lease or fee interest, but is subject to the possible further modification if some other producing entity has been recognized by the applicable state authority, which describes a different right to produce. (*Id.*)

FEA then gave particular recognition to Louisiana unitization procedures:

> For example, in Louisiana, where unitization may be compelled by the Commissioner of Conservation, the recognition by the state of producing entities is generally based upon factors other than merely surface boundaries. Such productive entities are called "units," although the term does not always denote the combination of separate lease or fee interests into the type of "unitization" described in Ruling 1975-15. It may, instead, indicate the recognition of the geological limits of a producing reservoir which lies entirely within the surface boundaries of a single lease. Such units may be formed in Louisiana as a

> result of a formal proceeding, and they then become separate producing entities recognized by the state. The balance of production from the non-unitized portion of the lease is then also recognized by the state as a producing entity. Accordingly, in Louisiana each state recognized unit may therefore appropriately describe a property, with each lease upon which is reported non-unitized production also appropriately describing a separate property.
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> * * * *
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> Accordingly, for purposes of FEA price regulations, the property concept may appropriately recognize such producing entities, as recognized by state bodies, whether the entity is the lease, some portion of the lease, or the unitization of parts of two or more leases. (*Id.*)

However, the FEA declined to adopt the regulatory changes proposed in April, and on August 20, 1976, FEA issued the rule which is the focus of this lawsuit. 41 Fed. Reg. 36172 (August 26, 1976). FEA added an additional provision to the "property" definition:

> "Property" means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation. (*Id.* at 36184)

The first sentence of this new definition merely repeated the CLC definition, as reworded, without substantive change, by FEA in February, 1976. The second sentence was to have prospective application from September 1, 1976, to permit producers prospectively to treat "as a

separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation."

FEA discussed at some length its interpretation of the basic "property" definition and adopted the position that "property", as defined by CLC in 1973, and as reformulated in 1976,

> is generally to be understood as synonymous with the physical "tract" or "premises" as to which a working interest is established by an oil and gas lease, or by a fee interest. (*Id.* at 36174)

In so doing, the plaintiff claims that FEA abandoned its previously stated position that "property" could be defined by "rights to produce" other than the leasehold or fee interest (*e.g.*, LOC unitization orders).

Moreover, FEA concluded that:

> CLC, by its definition of the term "property" intended to refer to the premises described in the oil and gas lease pursuant to which crude oil was being produced. It also appears that this is the reasonable meaning of the definition that CLC used and that the definition should have been so understood. (*Id.*)

By imputing this intention to CLC, FEA held that "property" had *ab initio* meant the premises defined by a lease or fee interest.

On January 13, 1977, FEA issued Ruling 1977-1. 42 Fed.Reg. 3628 (January 19, 1977) It restated verbatim the "interpretive portions of the August 20 Notice", including its interpretation of the 1973 "property" definition and the clarifications thereto. *Id.* at 3629.

On January 19, 1977, FEA issued Ruling 1977-2. 42 Fed.Reg. 4409 (January 25, 1977) This ruling iterated

the interpretation of Ruling 1977-1 that the "literal application" of the "property" definition was " 'premises described by an oil and gas lease.' " *Id.* at 4410.

On the basis of these rulings, DOE has instituted administrative enforcement proceedings against producers of oil in Louisiana, claiming that their treatment of LOC units as "properties" has resulted in over a billion dollars in overcharges.

The Office of Special Counsel ("OSC") initiated an audit of Texaco's domestically produced crude oil sales on August 1, 1977. On January 24, 1978, OSC issued a Notice of Probable Violation ("NOPV") to Texaco, which set forth the findings of the audit and identified particular instances where OSC had tentatively concluded that Texaco had sold domestically produced crude oil at prices in excess of the maximum lawful selling price. Certain of these instances were with respect to crude oil produced from properties in Louisiana.

The Proposed Remedial Order ("PRO") [3] issued to Texaco on May 1, 1979, alleged that Texaco had violated the price regulations applicable to the first sales of domestically produced crude oil and that for the period September, 1973, through March, 1979, the overcharges resulting from these violations amounted to not less than $748,801,210.00, plus interest. Louisiana claims that if it must repay all the taxes and royalties that it has collected on that alleged overcharge, its liability for that item alone could amount to $160 million. Texaco filed a timely Notice of Objection to the PRO. The ongoing ad-

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[3] If DOE determines that violation of its regulations has occurred, the next step is issuance of a Proposed Remedial Order ("PRO"), which must set forth the proposed findings of fact and conclusions of law upon which it is based. 10 C.F.R. §§ 205.192(a) and (d). If the PRO is contested by the recipient by filing a Notice of Objection, the matter proceeds to an adversary, adjudicatory proceeding before the Office of Hearings and Appeals ("OHA") of the DOE. 10 C.F.R. § 205.193(a).

ministrative proceedings before the Office of Hearings and Appeals ("OHA") are currently in the discovery stage.

Following the institution of administrative proceedings against it for alleged overcharges, Texaco filed suit against DOE in the United States District Court for the District of Delaware on July 3, 1979.

Louisiana and LL&E were granted leave to intervene as of right in the Delaware action, under Rule 24(a) of the Federal Rules of Civil Procedure, by order of the Court.

On August 27, 1979, DOE moved to dismiss the action on the ground that the action was not ripe for pre-enforcement review and that the plaintiffs had not exhausted their administrative remedies.

On May 6, 1980, the Honorable Judge Walter K. Stapleton issued his Order and Opinion in *Texaco, Inc., et al. v. Department of Energy, et al.*, 490 F.Supp. 874 (D.Del.1980) ("*Texaco*"). Judge Stapleton dismissed the complaints of Texaco and LL&E, and found that the court lacked jurisdiction because the claims were not ripe for judicial review. Judge Stapleton declined to rule on DOE's motion to dismiss the complaint of Louisiana, noting his intent to await the Answer of the agency in which it could assert improper venue under 28 U.S.C. § 1391(e).

On May 15, 1980, Louisiana noticed its voluntary dismissal of the action in Delaware, and on May 27, 1980, it filed the instant action in the U.S. District Court for the Western District of Louisiana. This Court granted Texaco's motion to intervene in this action by an Order issued June 23, 1980. It similarly granted LL&E leave to intervene in this action by an order issued July 2, 1980.

Lack of Standing

DOE claims that since Louisiana is alleging injury to its citizens generally as a result of lost tax revenues, Louisiana is attempting to bring this action as *parens patriae* on behalf of its citizens. Without conceding that loss of tax revenues is solely an action based on *parens patriae*, plaintiff had admitted in its argument [4] that it does not sue in *parens patriae* on behalf of its citizens but for loss of tax revenues.

Therefore, it must be decided whether or not Louisiana has a proprietary interest to sue as a taxing sovereign and royalty owner to determine standing. In *Association of Data Processing Service v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), the Supreme Court delineated a two-part test for determining whether a party has standing to challenge administrative action; first, the plaintiff must demonstrate that it has suffered an injury in fact, and, second, that the plaintiff's interests are arguably within the zone of interests to be protected or regulated by the statute in question.

DOE asserts that Louisiana cannot meet the first part of the test since its claim of injury is no more than speculation that it may be required to reimburse producers for overpayments of severance taxes and royalties in the future. Louisiana may, however, start receiving less severance taxes and royalties in the not too distant future. Further, the argument by the DOE that only the possibility exists that the agency will determine that producers have violated the federal price regulations because of their designations of LOC units as separate properties is not realistic and cannot be accepted by this Court. To turn that argument around, it is more likely there is only a possibility that the agency will determine that producers have *not* violated the federal price regulations.

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[4] Page 50 in oral argument, October 3, 1980.

DOE contends that Louisiana cannot meet the second requirement of the standing test because its interests do not come within the zone of interests to be protected. DOE asserts that Section 211 of the Economic Stablization Act of 1970, 12 U.S.C. § 1904 is extended only with respect to final agency action and in the instant case, the agency has issued no final determination that producers of crude oil are in violation of the federal price regulations for their designation of LOC units as separate properties.

It should be noted that Louisiana is not challenging the enforcement proceedings that DOE has brought against producers in Louisiana, but the DOE's position on property which Louisiana asserts is *final.* This position was made by DOE in the Texaco case, and it was properly rejected by the Court, at 490 F.Supp. 885, 886:

> (P)laintiffs primarily seek not review of the agency's enforcement proceeding currently proceeding against Texaco, but rather extraenforcement review of the DOE regulatory pronouncements upon which the enforcement proceeding is concededly predicated, Rulings 1975-15, 1977-1, and 1977-2, as well as the notice issued August 20, 1976 . . . (I)t is unmistakable . . . that their quarrel is with the regulations rather than the compliance proceeding.

Further, the DOE conceded that the OHA is bound to treat the challenged regulation as valid in the Delaware action. As Judge Stapleton explained at 490 F.Supp. 886 n. 17:

> At oral argument counsel for the DOE conceded that the OHA would be bound to treat the challenged regulations as valid and took no position as to FERC's authority to disregard them or to find them to be invalid. Tr. of Oral Argument at 118.

A DOE ruling is an interpretation of general applicability. 43 Fed.Reg. 3569 (January 26, 1978). Such a ruling is not subject to administrative appeal. 10 C.F.R. § 205.154 (1980).

> It is clear as Judge Stapleton found: Neither the DOEA nor the relevant regulations indicate that DOE will consider the validity of the challenged regulations at a subsequent stage of the compliance process. (490 F.Supp. at 886)

An agency position "is clearly 'final agency action' . . . (where it) will not be the subject of any further proceedings at the (agency)." *Ecee, Inc. v. Federal Energy Regulatory Commission, supra,* 611 F.2d at 557. As the Lake Charles Division of this Court has stated:

> The label an agency attaches to its action is not dispositive. The action may be reviewable even though it is an announcement of a rule or policy that the agency has not yet put into effect. *Dow Chemical, supra,* 459 F.Supp. at 386.

Claims Not Ripe for Judicial Review and Plaintiffs Have Failed to Exhaust Administrative Remedies

DOE takes the position that the claims raised by Louisiana are not ripe for judicial review.

The application of the ripeness doctrine to pre-enforcement judicial review of administrative actions requires that the reviewing court, before undertaking review of a purported agency action, finds that the following four factors are all present: (1) the issues presented are purely legal, (2) the issues arise out of final agency action, (3) the controversy has a direct and immediate impact on plaintiff's business, *and* (4) litigation of the controversy will expedite final resolution of the matter rather than delay or impede effective agency enforcement efforts. *Abbott Laboratories, Inc. v. Gardner, supra; Toilet Goods Association, Inc. v. Gardner,* 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *Bankers Life & Cas. Co. v. Callaway,* 530 F.2d 625 (5th Cir. 1976); *Pennzoil Company v. Department of Energy,* 466 F.Supp. 238 (D.Del.1979); *Phillips Petroleum Co. v. Federal Administration,* 435 F. Supp. 1239 (D.Del. 1977).

The question as to whether the issues presented are purely legal has been partially covered. Louisiana is not asking this Court to examine any particular LOC unit to determine if it meets the regulatory "criteria". Rather, Louisiana asks this Court to examine the applicable regulations, rulings and interpretations and to declare what the proper "criteria" are. Any factual controversy as to whether producers' designations properly conformed to the correct interpretation of "property" is severable from the issue of what that correct interpretation is.

The essence of Louisiana's claims is that DOE, in its August 20, 1976 rulemaking, restated in Ruling 1977-1, improperly interpreted the 1973 CLC definition of "property". This claim raises two purely legal issues: (i) whether DOE's interpretation is valid; and, (ii) if DOE's interpretation is valid, whether it is the only reasonable interpretation and thereby entitled to retroactive application.[5]

As Judge Stapleton found in the Texaco case, this Court also finds that plaintiff herein does not ask this Court to determine whether *any property* involved in the RO proceeding does or does not violate Rulings 1975-15, 1977-1, and 1977-2. The resolution of the legal issues raised by plaintiff do not fall within the special competence of the DOE or require further development of a factual record. Each requires this Court only to examine the language of the regulations, in the context of the Congressional intent behind the applicable statutes, and the relevant regulatory decisions.

DOE contends that there has been no "final agency action" on the position that LOC units *per se* may not be treated as separate properties for purposes of price regulations. The DOE's interpretation in Rulings 1977-1 and

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[5] Whether DOE employed the proper administrative procedures in arriving at its interpretation has been withdrawn from the Court's consideration in view of Louisiana's Amended Complaint.

1977-2, in this Court's opinion, constitutes the Department's final position on the "property" definition.

The regulations allow certain state-recognized producing reservoirs to be treated as separate properties by virtue of state recognition alone, but such treatment would be effective only from September 1, 1976, onward. That final position has certainly caused injury to Louisiana.

Even if OHA can reconsider DOE's "property" interpretation, this Court should not withhold review. Herein, the lines are drawn, the positions are taken and the matter is ripe for judicial review. *State of Florida v. Weinberger*, 482 F.2d 488 (5th Cir. 1974).

DOE asserts that the controversy does not have a direct and immediate impact on Louisiana, and that a potential injury to its treasury is insufficient to support a finding of the kind of hardship which is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. In support of this position, DOE relies on the decision of the Delaware case, wherein Judge Stapleton stated that Texaco and LL&E were not confronted with a direct and immediate hardship, supra, 490 F.Supp. at Page 888:

> In the typical case, though the Court conducts a searching inquiry to determine whether the party seeking relief satisfies the hardship requirement of the ripeness doctrine, it is taken for granted that the plaintiff is subject to the challenged action, that compliance with the action is expected by the agency, and that compliance will entail costs for the plaintiff. *See, e.g., National Automatic Laundry and Cleaning Council v. Schultz*, [143 U.S. App.D.C. 274], 443 F.2d 689 (D.C.Cir. 1971); *Pennzoil v. Department of Energy, supra*, 466 F.Supp. 238; *Romeo Community Schools v. Department of Health, Education, and Welfare*, 438 F.Supp. 1021, 1028 (E.D.Mich.1977).

> In the instant case, however, Texaco denies that compliance with the DOE regulations it seeks to challenge will impose any costs upon it by asserting, in its "secondary" position, that it has not violated those regulations. While the pricing dilemma Texaco would face might satisfy the hardship requirement were it clear that it violated the regulations, I do not understand how Texaco can be placed on the horns of a pricing dilemma by regulations with which it purports to comply and with which the DOE has yet to determine it does not comply. In short, Texaco has failed to allege or show that compliance with the DOE regulations it challenges will impose any costs upon it, let alone place it on the horns of an ongoing pricing dilemma.

DOE contends that Louisiana's position in the present controversy is the same as that of LL&E in the Delaware case, and that position finds some support in Judge Stapleton's opinion, at Pages 34-35:

> In the absence of either a final DOE determination that LOC units in which LL&E holds a . . . royalty interest are designated as properties in violation of the challenged regulations or a concession to that effect by LL&E, therefore, the hardship it fears is simply too speculative to permit judicial review at this time.
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> * * * *
>
> Like Texaco's and LL&E's complaints, Louisiana's makes the alternative assertions that Texaco's LOC units may be designated as properties consistent with the challenged regulations and that the regulations are invalid only to the extent that they purport to prohibit such designations. Accordingly, any hardship which Louisiana may suffer as a result of DOE action with respect to Texaco's pricing practices is also too speculative under the ripeness doctrine to justify immediate judicial review.

However, Louisiana contends that it is presently receiving reduced royalties from some oil produced from properties it owns and is receiving diminished severance taxes from some of the oil produced in the State.

Producers who have followed, or are following, DOE's ruling that the leasehold, rather than the LOC unit, defines the "property" have paid and are paying to Louisiana, reduced severance taxes and royalties.[6]

In *Com. of Pa. by Shapp v. Kleppe*, 174 U.S.App.D.C. 441, 533 F.2d 668 (1976), the Court recognized the principle that lost tax revenues could confer standing where there existed "some fairly direct link between the state's status as a collector and recipient of revenues, and the legislative or administrative action being challenged."

The injury need not occur prior to judicial review and agency action may be reviewable even though it is never to have any formal effect. *Dow Chemical v. Consumer Product Safety Commission*, 459 F.Supp. 378, 386 (1978). In *State of Florida v. Weinberger*, supra, 492 F.2d at 492, the Court found sufficient injury to Florida in the choice between undertaking "likely financial outlay, and certain legislative and administrative effort" or

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[6] Producers who have stopped treating LOC units as "properties" on the basis of DOE's view of "property" as a leasehold have sought from the State recoupment of allegedly excess royalties paid. On September 11, 1978, there were pending before the State Mineral Board claims for recoupment of supposedly excess royalties paid, based on oil pricing decisions by companies where there had been no FEA audit, of $393,842.81. Not all of these claims were based on changes in the treatment of "properties". However, one claim was by Shell Oil Company for $86,116.00 based on its view that it had improperly treated an LOC Proration Reservoir as a separate "property" and had overpaid royalties in that amount. Also, Kerr-McGee Corporation, on being accused by DOE of overcharges in excess of one million dollars because it treated LOC reservoir units as separate "properties", demanded recoupment of $128,591.19 in royalties.

undergoing the "risk (of) the at least termporary loss of funding which a conformity hearing . . . could well produce."

Louisiana is not merely a complainant whose rights are affected *only* on the contingency of future administrative action. Producers other than Texaco which make royalty and severance tax payments to Louisiana have acceded to the views which they believe are expressed in Rulings 1975-15, 1977-1, and 1977-2, and have thereby refunded the overcharges resulting from their earlier treatment of multiple LOC's located on a single premises as multiple properties, and have made claims against Louisiana for refunds of corresponding amounts of royalty and severance tax payments.

Therefore, it appears that only prompt resolution of the overriding legal question—to interpret the regulation which defines property as a right to produce from a lease or a fee interest—can alleviate any injury that Louisiana has experienced as a result of DOE's action.

The Court feels that the resolution of this legal question will foster rather than impede the final resolution of this matter.

Action Should Be Stayed Under the Doctrine of Primary Jurisdiction

DOE contends that this action should be stayed under the doctrine of primary jurisdiction. In *Mississippi Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412 (5th Cir. 1976), cert. denied, the Fifth Circuit elucidated the purpose of primary jurisdiction:

> When legal disputes develop that directly affect an industry subject to regulation, the need arises to integrate the regulatory agency into the judicial decision making process. One method to accomplish integration is to have the agency pass in the first instance on those issues that are within its competence.

> In short, the agency should have the *first word* (*Id.* at 417 (emphasis added).)

As suggested by plaintiff, here the DOE had the "first word" but its first word was also its final word. In *Phillips Petroleum Co. v. Federal Energy Administration*, supra, the Court stated 435 F.Supp. at Page 1249:

> The FEA has already had the first word and made final decision on the legal issues for determination before this Court. Plaintiffs here simply seek review of the final agency decision, calling into question the *meaning* and *validity* of the *relevant regulations*. Thus, the doctrine of primary jurisdiction is inapplicable to this litigation with respect to the issues finally determined by the FEA. (435 F.Supp. at 1249 (citations omitted; emphasis added).)

In *Standard Oil Co. v. Federal Energy Administration*, 440 F.Supp. 328, 371 (1977), the Court declined to accept FEA's invitation to refer to the agency issues to which the agency had reached a final position.

Texaco and LL&E as Intervenors

Since this Court feels that Louisiana is properly before the Court, is is unnecessary to consider whether Texaco meets the standards for ripeness or exhaustion of administrative remedies, and Judge Stapleton's decision in the Delaware case is not a bar to Texaco's intervention in this action. Therein, Judge Stapleton held that Texaco failed to m[illegible] one of the four requirements of ripeness but that holding cannot be a bar on the ground of res judicata because ripeness is not required for intervention as of right under Rule 24 of the Federal Rules of Civil Procedure. At this point, the question is whether the prospective intervenor has a sufficient stake in the outcome and enough to contribute to the resolution of the controversy to justify his inclusion. *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 St.Ct. 630, 30 L.Ed.2d

686 (1972).[7] Since the regulations and rules placed in issue by Louisiana herein are the same regulations and rules under which the DOE has charged Texaco with exceeding by almost $800 million the authorized price for domestic crude produced by Texaco, it is clear that Texaco has a sufficient stake in this controversy.

What has been said in regard to Texaco is equally applicable to LL&E. LL&E is a working or royalty interest owner in a number of crude oil producing properties in Louisiana, the production of which consistently has been accounted for and priced on the basis that LOC units may be designated as separate "properties" under the Mandatory Petroleum Price Regulations ("MPPR"). In the event that LL&E's contention that LOC units constitute separate properties is rejected, recently initiated internal audits which have been conducted by LL&E have revealed that crude oil production from certain of the LL&E properties have been sold at a price which would be unlawful under the MPPR. Consequently, LL&E will be subject to substantial refund and penalty requirements, and the decision adverse to the plaintiff, Louisiana, in this litigation, would have immediate and substantial harmful impact upon the interests of LL&E. Furthermore, if 10 C.F.R. § 212.72 is construed to disallow LOC units as separate properties, LL&E has ascertained and now concedes that it has no other factual or legal basis for the prices charged for crude oil production from a number of its substantial Louisiana properties at issue in the enforcement proceedings.

For the record, this Court would differ with Judge Stapleton's conclusion that since plaintiff contends that producers have not violated federal price regulations, the claims are not ripe for judicial review. We live in a real

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[7] See also Shapiro, *Some Thoughts On Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv.L.Rev. 721, 726 (1968), cited in *Trbovich v. United Mine Workers*, 404 U.S. at 536 n.7, 92 S.Ct. at 635 n.7.

world. This Court cannot, under real world standards, believe that the PRO issued by the DOE to Texaco on May 1, 1979, alleging overcharges approaching $800 million are totally unfounded under the DOE's applied criteria and will be rejected in the administrative proceedings. As the Court stated in *Phillips Petroleum v. Federal Energy Administration*, supra, 435 F.Supp. at 1248 (1977), "A Court should not stand aside just because there is available to the plaintiff some collateral agency proceedings that hold out the *possibility* of some kind of relief."

Conclusion

In 1973, following the presidential decision to freeze the price of domestic crude oil, the CLC promulgated regulations under which the price at which crude oil could be sold depended on the vintage of the "property" from which it was produced. CLC defined "property" as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum". Since that time, Louisiana and producers within the state have regarded LOC-recognized production units as "properties" under that definition.

Whether the designation of LOC units *per se* as "separate properties" is valid under the proper interpretation of the regulatory definition of property is not before the Court. The agency will apply the federal regulations which set forth when a property may be designated as a property. Louisiana has a separate criteria which it uses for the purpose of its conservation laws; i.e., LOC designations.

However, the DOE remained silent after 1973, as to the interpretation and application of the property concept for almost two years and producers construed this regulation to permit them to treat LOC units as separate properties. Was that reasonable? Not necessarily so. There may be LOC units that cannot be reasonably in-

terpreted to be consistent with the goals to control inflation and stimulate increased production.[8] The DOE will have to make such a determination under its ongoing proceedings. On the other hand, there may be LOC units that clearly qualify, but not because they are LOC units.

In the August, 1976 preamble to the amended definition of property, the FEA implied that as originally drafted, § 212.72 prohibited the designation of LOC units as properties and asserted for the first time that 1975-15 had expressly precluded the designation of "separate pools and reservoirs" as individual properties even if recognized by state regulatory agencies. Further, the FEA announced its intention to enforce this interpretation on a retroactive basis against producers, and at the same time, permitted producers to treat as a separate property, each separate and distinct producing reservoir but only prospectively from September 1, 1976.[9] This Court can only conclude that if this is just and right, then all we have been taught in the past is wrong. The meaning of "property" as treated herein should be constant. It should not change with a chage in the economic and political climate. If the DOE will accept LOC reservoir-wide units as property after September 1, 1976, it was certainly reasonable for producers to treat them as properties before 1976.

It is clear that the original property definition was ambiguous and subject to various "good faith interpretations". 41 Fed.Reg. 3172 (Aug. 20, 1976).[10] Even when

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[8] The DOE contends that the primary Congressional objective was to stem the tide of inflation by limiting the price of oil and "nowhere did Congress require the President to affirmatively encourage oil production". Due to the seriousness of the oil shortage, it goes without saying that a primary goal of Congress was to increase production, otherwise there would be no reason to establish an upper tier price.

[9] 41 Fed.Reg. 36172, 37179 (August 26, 1976).

[10] In *Grigsby v. Department of Energy*, 585 F.2d 1069, *modified on rehearing*, 585 F.2d 1080 (Em.App.1978), *cert. denied*, 440 U.S.

you play "pin the tail on the donkey", the rules require that you turn the blindfolded participant in the right direction. The cases are clear that a *post hoc* agency interpretation of an ambiguous regulation should not be enforced retroactively against a regulated party who adopted and applied an alternate reasonable interpretation of the regulation during the period between the initial promulgation of the ambiguous regulation and the later agency interpretation. *Standard Oil Co. v. Federal Energy Administration*, 453 F.Supp. 203 (1978); *Phillips Petroleum Co. v. Federal Energy Administration*, 449 F.Supp. 760 (1978); *Standard Oil Company v. Department of Energy*, 596 F.2d 1029 (Em.App.1978).

The defendants' Motion to Vacate the orders granting intervention to Texaco and LL&E is DENIED, and the Court will allow intervention by Texaco and LL&E under Rule 24(a) of the Federal Rules of Civil Procedure.

The Court will deny the defendants' Motion to Dismiss the complaint of Louisiana, and consider the question of whether separate and distinct producing reservoirs that qualify as separate properties under the amended 1976 definition would have been a valid and reasonable interpretation under the regulatory definition of properties from August 19, 1973, to September 1, 1976.[11]

908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979), the Court held that "property is to be defined as the 'right to produce' ", at Page 1083:

> *The focus of the "property" definition is upon the "right to produce,"* not the fee or leasehold nature of the ownership interest . . .
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> * * * *
>
> The "right to produce" arises from a combination of sources, including, but not limited to, the nature of the ownership interest, contractual extension or restriction of ownership interest, and *orders of state regulatory agencies* . . . Although the fee or leasehold interest may be the origin of the "right to produce", such a *"right to produce" is controlled, limited, or extended by contractual agreement and state authorities.*

[11] August 19, 1973 was the effective date of the two-tier pricing system for crude oil and September 1, 1976 was the effective date DOE interpreted property as used in the 1973 definition to be synonymous with the surface acreage of the lease or fee interest.

APPENDIX E

UNITED STATES DISTRICT COURT
W. D. LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civ. A. No. 800812

STATE OF LOUISIANA,
Plaintiff,

TEXACO, INC.,
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Intervening Plaintiffs,

v.

DEPARTMENT OF ENERGY and CHARLES W. DUNCAN, JR.,
Secretary of Energy,
Defendants.

July 7, 1981

Camp, Carmouche, Palmer, Barsh & Hunter, Harry E. Barsh and David R. Frohn, Lake Charles, La., for plaintiff.

Morris, Nichols, Arsht, & Tunnell, Andrew B. Kirkpatrick, Jr. and Lawrence A. Hamermesh, Wm. O. LaMotte, Wilmington, Del., for intervenor—Texaco.

Bracewell & Patterson, Roger L. Reynolds, and Darci L. Rock, Washington, D.C., Milling, Benson, Woodward, Hillyer, Pierson & Miller, J. Henry Phillips, III, New Orleans, La., for LA Land & Exploration Co.

Allan Abbot Tuttle, Patton, Boggs & Blow, Washington, D.C., for State of La.

Caffery, Oubre & Dugas, Patrick T. Caffery, New Iberia, La., for defendants.

J. Ransdell Keene, Frances O. Allen, Shreveport, La. and Dennis G. Linder, Branch Director, Michael T.

Scott, Civil Division, Dept. of Justice, Washington, D.C., Nancy Cirsman and Judith Mather, Regulatory Litigation Division, Washington, D.C., David R. Hughes, Dept. of Spec. Counsel, Washington, D.C., for Dept. of Energy.

Frederick W. Veters, New Orleans, La., Stephen H. Bard, Texaco, Inc., White Plains, N.Y., for Texaco.

RULING ON MOTION

SHAW, District Judge.

This matter involves a Motion for Summary Judgment by plaintiffs, State of Louisiana ("Louisiana"), Texaco, Inc. ("Texaco"), and the Louisiana Land and Exploration Company ("LL&E"), in accordance with Rule 56(a) of the Federal Rules of Civil Procedure. The plaintiffs in this case respectfully ask this Court to declare:

1. That reservoir-wide LOC production units are "properties" within the meaning of the original property definition;

2. That the contrary position of the DOE is erroneous; and,

3. That, under all the circumstances, crude oil producers in Louisiana have been entitled to rely, since August, 1973, upon a reasonable interpretation of the "property" definition to treat separate reservoir-wide LOC units as properties under the MPPR. The plaintiffs further request this Court to enjoin the defendants from seeking to enforce a property definition which conflicts with the above declarations of law.

In addition to the Finding of Fact and Conclusions of Law set forth in *State of Louisiana v. Department of Energy*, 507 F.Supp. 1365 (1981), this Court makes the following additional findings and conclusions:

The defendants, Department of Energy ("DOE"), claim that the Court has invented an issue which is not actually before it, as the plaintiffs never adopted and applied the interpretation of "property" suggested by the Court. As to the first point, the Court cannot accept the honor, for one cannot claim as his invention that which is obvious. Plaintiffs could have applied the interpretation suggested by the Court as it would have afforded the lesser relief which was included in the greater relief sought.

DOE contends that there is nothing contained in any statewide orders or the appropriate statutes which indicates that LOC engages in a determination of reservoir dimensions prior to the issuance of a drilling permit. It is undisputed that Louisiana recognizes production units based on the geological limits of a producing reservoir which lies entirely within the surface boundaries of a single lease. *State of Louisiana v. Department of Energy*, supra, at 1368. The right to produce may arise from more than one basis or designation. If producers elect one method they should not be required to abandon another. For instance, Texaco selected a bookkeeping method that it already had in place and correlated with an interpretation of "property" which included reservoir-wide LOC units as "properties".

The LOC is the agency primarily responsible for the regulation of the production of oil and gas within the State of Louisiana. The Commissioner has jurisdiction and authority over all persons and property necessary to enforce the laws of Louisiana relating to the conservation of oil and gas. LSA-R.S. § 30:4(A). The Commissioner is also specifically authorized by statute to make reasonable rules, regulations and orders to limit and prorate the production of oil and gas from any pool or field for the prevention of waste. LSA-R.S. § 30:4(C).

The fulfillment of this objective requires that the integrity of the oil and gas reservoir, or pool, be main-

tained. Therefore, the exhibits and affidavit filed in support of the Motion for Summary Judgment clearly show that each separate and distinct producing reservoir is recognized and can be determined by LOC as a producing formation that is separate and distinct from, and not in communication with, any other producing formation. The comprehensive system established by LOC was in operation prior to the establishment of the two-tier system for regulating crude oil prices by CLC.

In *Grigsby v. Department of Energy*, 585 F.2d 1069 (Em. App. 1978), TECA held that the drilling unit and not the lease, controlled and defined the "property" designation. A large percentage of crude oil production in Louisiana, is derived from premises owned by the state and leased to producers. Such leases extend to cover many square miles and encompass many reservoirs. If the property was the lease, even the most successful efforts at new or increased production for some reservoirs might be offset by the general decline in production from existing producing reservoirs resulting in less incentive to discover and develop new reservoirs contrary to the goal to stimulate increased production. *Because reservoir-wide production units reflect geological facts, they are not subject to gerrymandering.* Thus, the designation of such units as properties is consistent with the objectives of the two-tier pricing system established in 1973.

As this Court stated in its original opinion, deference to an agency interpretation is not warranted when an agency attempts retroactively to impose an interpretation of an ambiguous regulation, when that interpretation, even if reasonable, is not compelled, and when the regulated parties have adopted equally reasonable, if not more reasonable, interpretations of the regulation. *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1056 (Em. App. 1978) Extraordinary circumstances ex-

ist herein and Standard Oil III teaches that this Court should not apply the rule of deference in this case.

The DOE, itself, admitted in its hearings before a Congressional subcommittee that the property definition was ambiguous and unclear, and that the meaning had not been clear to the agency. 41 Fed. Reg. 36172, 36175, August 20, 1976. Further, the DOE did not decide upon or publicly announce its interpretation of the property definition until the end of the relevant period; i.e., until August, 1976. Yet, only a few months earlier, in April, 1976, DOE announced that it had concluded, albeit tentatively, that reservoir-wide LOC production units could be properly designated as properties.

The defendants' latest memorandum and supporting documents fail to convince the Court that there is a genuine issue as to any material fact or that there is any need for discovery. The Court finds that the plaintiffs' interpretation was reasonable. Separate and distinct producing reservoirs that qualify as separate properties under the amended 1976 definition is a valid, reasonable and enforceable interpretation of the regulatory definition of "properties" from August 19, 1973, to August 20, 1976. The Motion for Summary Judgment filed on behalf of the plaintiffs to that extent, is GRANTED.

The defendants, Department of Energy and James B. Edwards, Secretary of Energy, are hereby enjoined and prohibited from proceeding administratively against plaintiffs producing oil in Louisiana, for the period in question on the basis of a property definition which conflicts with the above declarations of law.

Further, it is not necessary that the Court decide whether the Federal Energy Administration's August 20, 1976 rulemaking and Rulings 1977-1 and 1977-2 are invalid to any extent, as the Court finds they cannot be enforced against plaintiffs for the period August 19, 1973, through August 20, 1976.

Further, the Court need not determine whether the judicial review provisions of the Economic Stabilization Act limits the injunctive power of district courts to parties before it because this Court has no intention of enjoining enforcement action against all persons producing crude oil in Louisiana. Any units that are not recognized by state authority are not at issue in this case. The only reservoir-wide LOC units that are the subject of this action require LOC approval prior to their establishment.

The Court also feels that the initial promulgation of the property definition is not invalid but that fact does not remove this case from the principle enunciated in *Standard Oil*, as it offered no clue whatsoever to producers that separate and distinct producing reservoirs, as treated herein, would not qualify as separate properties. The DOE formulated or made its position clear only after the relevant period in question herein.

The Court will GRANT the plaintiff's Motion for Summary Judgment, pursuant to the reasons stated above.

APPENDIX F

10 C.F.R. § 212.72 Definitions.

Base Production Control Level

"Base Production Control Level" for a particular month for a particular property means:

(1) if crude petroleum was produced and sold from that property in every month of 1972, the total number of barrels of domestic crude petroleum produced and sold from that property in the same month of 1972;

(2) if domestic crude petroleum was not produced and sold from that property in every month of 1972, the total number of barrels of domestic crude petroleum produced and sold from that property in 1972 divided by 12.

39 Fed. Reg. 1924 (Jan. 15, 1974), originally codified as 6 C.F.R. § 154(b), 38 Fed. Reg. 22536, 22538 (Aug. 22, 1973). This definition was amended by substituting "crude oil" for "crude petroleum" effective August 30, 1974. 39 Fed. Reg. 31622 (Aug. 30, 1974).

Property

"Property" is the right which arises from a lease or from a fee interest to produce domestic crude oil.

New Crude Petroleum

"New crude petroleum" means the total number of barrels of domestic crude petroleum produced and sold from a property in a specific month less the base production control level for that property.

39 Fed. Reg. 1924 (Jan. 15, 1974), originally codified at 6 C.F.R. § 154(b), 38 Fed. Reg. 22536, 22538 (Aug. 22, 1973).

APPENDIX G

RULES AND REGULATIONS

Title 10—Energy

CHAPTER II—FEDERAL ENERGY ADMINISTRATION

PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Clarification to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil

On April 13, 1976, the Federal Energy Administration ("FEA") gave notice (41 FR 16179, April 16, 1976) of a proposed rulemaking and public hearing to consider clarifications to certain technical aspects of the Mandatory Petroleum Price Regulations applicable to domestic crude oil (10 CFR Part 212, Subpart D).

The FEA did not propose in this rulemaking proceeding to alter any of the major policy decisions already reached, or now under consideration, in the three rulemaking stages to implement the crude oil pricing policies of the Energy Policy and Conservation Act ("EPCA," Pub. L. 94-163). Rather, the purpose of the present rulemaking proceeding has been to resolve as many as possible of a variety of more technical subsidiary issues that have arisen in connection with the implementation of the EPCA. These issues include those related to the definition of "property" and "posted price;" whether a well is properly classified as an "oil well" for purposes of the stripper well lease rule; the partial rescission and modification of Ruling 1975-15, including the issue whether a property's producing patterns have been "significantly altered" for purposes of the enhanced recovery rule applicable to unitized properties (10 CFR 212.75); and whether the certification of domestic crude oil sales presently required in 10 CFR 212.131 is adequate to enable crude oil purchasers to report on the Form FEA-

P124-M-O, Domestic Crude Oil Purchaser's Monthly Report, notice of which was also issued on April 13, 1976.

In this proceeding, written comments were received from more than 45 interested persons, and public hearings were held in Denver, Colorado; Dallas, Texas; and Washington, D.C., at which oral presentations were received from more than 45 interested persons. After consideration of all the written and oral presentations, the FEA has determined that certain actions should be taken at this time.

I. THE DEFINITION OF "PROPERTY"

A. Outline of Common Legal Relationships in Crude Oil Production

Before discussing the purpose and intent of the crude oil pricing regulations and the definition of "property," a brief outline of the general nature of the legal relationships pursuant to which crude oil is typically produced should prove helpful in affording a better understanding of the issues involved.

Crude oil which can be commercially produced generally must be found in underground reservoirs—geological formations which have trapped a sufficient quantity of marketable crude oil to make production economically feasible. The nature of the interests which may exist in crude oil is extremely complex. In the simplest case, the owner of land in fee is generally entitled to produce and dispose of any crude oil which may be recovered by wells on that land. This right is not unqualified, however, but is subject to laws and regulations, which have been adopted in various states for conservation and other purposes, and to various legal doctrines which have evolved with respect to protection of the correllative rights of other parties, such as adjoining landowners, that may be affected by the landowner's production of crude oil.

In the typical case, however, the landowner does not exercise the right to produce crude oil which is inherent in the fee interest; rather, the various rights, powers, privileges, and immunities associated with the ownership of land in fee (and the crude oil which may be recovered therefrom) are transferred or otherwise divided among several parties. Although the nature of the interests which may be created by such transactions is virtually limitless, certain principal rights have been grouped together with sufficient frequency that they may be generally described as follows:

(a) Mineral interests,

(b) Royalty interests, and

(c) Leasehold interests.

Thus, the owner of the land may grant to others (or reserve to himself) the right to go upon the land and remove therefrom the crude oil (or other minerals) which may be found beneath the surface, thus separating this right (the "mineral interest") from the balance of rights otherwise appurtenant to the ownership of land.

The owner of the mineral interest may, in turn, execute what is generally known as an oil and gas lease, which typically conveys the right to go upon the land for the purpose of prospecting for and producing crude oil (the "leasehold interest"). Such leases are typically for a term of years, subject to extension in the event crude oil is produced from the land during the term described in the lease. In consideration for receiving such a "leasehold interest," the lessee usually agrees to deliver to the lessor free of cost a share of the crude oil produced from the land (said to be taken by the lessor "in kind"), or a share of the proceeds of such crude oil produced and sold from the land. This right, typically retained by the holder of the mineral interest, to a share of production or proceeds is described as a "royalty interest." (See generally 1 H. Williams and C. Meyers, Oil and Gas Law §§ 101, 201-202 (1975 Supp.), hereinafter cited as "Wil-

liams and Meyers.") An oil and gas lease may be described as follows:

> The basic document of the oil and gas industry is the lease which authorizes an operator, the lessee or his assignee, to enter upon described premises for the purpose of exploring for and developing the mineral resources in the premises. . . .
>
> The modern oil and gas lease is the product of conflicts between the landowner and the operator of the oil and gas interest. The operator has been desirous of securing a lease with a small capital investment, keeping the lease as long as it was productive or was valuable for speculative purposes, and at the same time, being able to terminate an unprofitable lease without liability to the lessor. The landowner has been interested primarily in obtaining royalties from the lease and therefore has pressed for immediate exploration and development operations. In lieu of exploration and development operations, the lessor has tried to secure a periodic return for the holding of the leasehold interest. However, he has also wanted to limit the time the lessee can postpone drilling by periodic payments, in order to prevent the lessee from holding the lease merely for speculation, and to assure the exploration and development of the lease within a short time. (3 Williams and Meyers § 601, at 1-2.)

B. Regulatory Background

In the April 13 Notice, FEA traced briefly the history of the two tier crude oil pricing system and the fundamental role played by the property concept under that system. To delineate further the issues addressed in this proceeding with respect to the definition of the term "property," and in order to place the comments received and the actions being taken by FEA in more adequate

perspective, a more detailed review of that history is appropriate.

The two tier pricing system was proposed on July 19, 1973 (38 FR 19464, July 20, 1973), by the Cost of Living Council ("CLC") under authority of the Economic Stabilization Act of 1970, as amended. In proposing the two tier system, CLC stated:

> The Council recognizes a need to stimulate increased production and is proposing a system which allows increased production (new crude petroleum) from each producing property and an equal amount of the current production (old crude petroleum) to be sold without respect to the ceiling price rule. Adoption of this incentive plan creates a two-tier pricing system for crude oil, which requires posting of two sets of prices, one for "old oil" and one for "new oil." Postings for "old oil" can be no higher than the ceiling price and postings for "new oil" is (sic) at the buyer's discretion.
>
> A crude oil producer is required to prorate among all his "old oil" buyers the amount of "old oil" freed from ceiling limitations by the production of a like amount of "new oil." (38 FR 19467.)

The regulations proposed on July 19 did not include a definition of the term "property," but defined "base production control level" (i.e., the level above which a property's current production and sale would qualify as "new oil") as follows:

"Base production control level" for a particular month means—

> (i) For a particular property on which the producer has leased production rights, the total number of barrels of domestic crude petroleum produced in the same month of 1972 from that property.
>
> (ii) For a particular property on which the producer owns production rights, the total number of

> barrels of domestic crude petroleum produced in the same month of 1972 from that property. (38 FR 19482.)

In adopting the two tier pricing system on August 17, 1973 (effective August 19, 1973,) (38 FR 22536, August 22, 1973), CLC indicated:

> A 2-tier price system has been adopted, providing for a ceiling on domestic crude petroleum prices but allowing new crude and an equivalent amount of old crude to be sold at prices above the ceiling. . . . (38 FR 22536.)

CLC also stated:

> . . . The substantive policy changes (between the July 19, 1973 proposal and the August 17, 1973 final regulations) were publicly announced on August 10. These regulations implement those policy decisions and, in addition, incorporate numerous changes to better implement the program. (38 FR 22536.)

The August 10 public announcement referred to above was in the form of a press release issued by CLC, stating that with respect to the two tier pricing system

> The Council has been very concerned that the final regulations strike a balance between constraining prices while at the same time encouraging the necessary increase in supplies which the country must have. . . .

The press release explained the two tier pricing system as follows:

> Rule: A two-tier pricing system is provided. Producers will have the opportunity to sell "new oil"—that above 1972 production levels—at free market prices.
>
> Reason: The two-tier pricing system which allows new oil to be sold at higher prices than "old oil" is expected to stimulate domestic crude oil production

> while maintaining price controls on oil presently being produced. The two-tier system will encourage increased investment in domestic exploration and will provide an economic incentive to allow the recovery of a larger percentage of oil in existing reservoirs. (2 Historical Working Papers on the Economic Stabilization Program August 15, 1971 to April 30, 1974, at 1259-60.)

There was no discussion of the term property in the preamble to the final regulations, but a definition of property was included in 6 CFR 150.354 of the August 17, 1973 final regulations, as follows:

> "Property" is the right which arises from a lease or from a fee interest to produce domestic crude petroleum. (38 FR 22538.)

Thus, from the very inception of the two tier pricing system, producers were required to measure current monthly production and sale of crude oil from a "property" against the amount of crude oil produced and sold from that same "property" in the same month of 1972, in order to determine the amount of current crude oil production which would be subject to the ceiling price rule.

CLC did not elaborate on the rationale for the two tier price system, beyond the statements quoted above concerning the need to constrain prices while at the same time encouraging increased production. Thus, CLC perceived its statutory objective as primarily to control inflation with what was envisioned to be a short-term program under authority of the Economic Stabilization Act of 1970. That Act was scheduled to expire, as it did, eight months later, on April 30, 1974. (Thus, for example, CLC began sector-by-sector decontrol on October 25, 1973.) FEA noted in the April 13 Notice with respect to this consideration that:

> Because the Economic Stabilization Program was always intended to be a temporary program, the

> regulations adopted pursuant to that program were designed so as to achieve the price control regulatory objectives with minimal disruption to normal business practices. Thus, a definition of property was adopted to serve two basic purposes. First, the entity was intended to be one for which producers would in their normal course of business maintain production records so that new recordkeeping or data collection by the producers would not generally be necessary and audits for compliance purposes would be facilitated. Second, the entity was designed to serve as the basic building block for the incentive system which rewarded increased or new production from a property by classifying that production as new crude oil. (41 FR 16180.)

It should be noted also that the concept of a "current cumulative deficiency" was also incorporated in the two tier pricing system from the outset. (Once new crude oil had been produced and sold from a property, and current production and sale then fell short of 1972 production and sale levels, new crude oil could not thereafter be sold from the property until enough production in excess of 1972 levels had been sold at the ceiling price even though it would otherwise have qualified as new crude oil but for the requirement to make up the cumulative deficiency.) However, the cumulative deficiency rule was not a significant factor in the early months of the two tier system, since production and sale levels in late 1973 were, in general, not ignificantly less than 1972 levels.

C. Legislative Background

The term "property" gained further significance under the crude oil pricing regulations with the advent of the statutory exemption from those regulations of the first sale of crude oil produced from stripper well leases, which was initially provided for by the Trans-Alaska Pipeline Authorization Act ("TAPAA," Pub. L. 93-

153), signed by the President on November 16, 1973. The exemption was implemented by CLC by an amendment to its regulations, which was issued November 21, 1973 and made effective as of November 16, 1973 (38 FR 32494, November 26, 1973). The amendment defined "stripper well lease" to mean a "property" (as previously defined in the two tier crude oil pricing regulations) whose average daily production did not exceed the qualifying limits set by the statute. In so doing, CLC stated:

> . . . For purposes of this exemption, the term "property" is described as being co-extensive with that "property" used to determine 1972 base production control levels, as measured by leases in existence in 1972. This narrow definition was adopted in order to comply with the Congressional intent expressed in the Conference Report which stated that the "Congress specifically intends that the regulations shall, among other things, prevent any 'gerrymandering' of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings" (H.R. Rep. No. 93-624). (38 FR 32495.)

On November 27, 1973, the Emergency Petroleum Allocation Act of 1973 ("EPAA," Pub. L. 93-159) was enacted, and it modified the test for stripper well lease qualification from one based on production levels during the preceding calendar month to one based on production levels during the preceding calendar year. A corresponding change in the crude oil pricing regulations was made by CLC, effective November 27, 1973 (38 FR 34464, December 14, 1973), but in all other respects the definition of stripper well lease remained as initially adopted.

Section 4(e)(2) of the EPAA provided for the stripper well lease exemption (until its repeal, effective February 1, 1976, by the Energy Policy and Conservation Act) and read, in part, as follows:

(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating as the maximum feasible rate of production and in accord with recognized conservation practices.

Neither the EPAA nor the TAPAA included a definition of the term "lease." The most extensive legislative history concerning the original stripper well lease exemption is found in the Conference Report accompanying the TAPAA.

Although the Conferees did not discuss the meaning of the term "lease," they did state:

> The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purposes described above is not in any way broadened. . . . Congress also directs that the administering agency shall promulgate regulations to implement the provisions of this section before it becomes operative. The Conferees expect the administering agency to utilize State data regarding production volumes, and to provide by regulation safeguards against the manipulation of gerrymandering of lease units in a manner that evades the price control and allocation programs.
>
> These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that

the regulations shall, among other things, prevent any "gerrymandering" of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. The sole purpose and objective of this Section 406 is to keep stripper wells—those producing less than ten barrels per day—in production and to insure that the crude oil they produce continues to be available for U.S. refineries and U.S. consumers. It is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day.

The Congress also intends that the regulations provide appropriate limitations and provisions in the definition of "lease" to insure that an administratively workable system is established which does not permit abuse. (Emphasis in original, H.R. Rep. No. 624, 93d Cong., 1st Sess. at —— (1973).)

The TAPAA stripper well lease exemption originated with a floor amendment that was introduced by Senator Bartlett of Oklahoma. The original text of the amendment provided that:

Those oil leases whose average daily production per well does not exceed that of a stripper well of not more than ten barrels of oil per day shall be exempt from any allocation or price restraints. . . . (119 Cong., Rec. S13432 (daily ed. July 14, 1973).)

In explaining this amendment Senator Bartlett stated:

So if the stripper producer had production that did not qualify, he, of course, would not be in any position to have that production exempted from price controls. It is done on a lease basis, because normally all the wells on one lease go into one tank or on a several tank basis. So if it is from a big well, the average goes away (sic) up.

> Incidentally, when subsidies were put on (stripper well production) during World War II, that went beyond just a lease basis; that was done on a field basis, because it is easier to do all the accounting that way. But in this case, it is only decided on a lease basis. (Id. at S13435, remarks of Senator Bartlett.)

It should be noted also that the sponsor of the amendment understood stripper wells typically to be operated by independent producers pursuant to a lease:

> Large oil companies have few stripper wells. Because of their higher operational costs, major oil companies are forced to sell their leases to independents—who can operate these leases for a longer period. (Id. at S13432.)

The legislation which became the Emergency Petroleum Allocation Act of 1973 ("EPAA") originated in the Senate where a bill was passed on June 5, 1973, containing no stripper well provision of any kind. When the House passed a similar version of the emergency petroleum allocation measure on October 17, 1973, it contained a "stripper" exemption applicable to wells rather than to leases. In the Conference Report of November 10, 1973, a stripper well lease provision was substituted, without comment, and this provision was subsequently adopted by Congress in the final version of the EPAA without debate or comment on the meaning of "leases."

The general legislative silence on the meaning of stripper well "leases" in connection with the drafting and passage of the EPAA can therefore be explained only by the fact that this matter was decided largely in connection with the TAPAA companion measure. These two statutory stripper well lease provisions, although identical insofar as the concept of "leases" is concerned, contained certain technical differences. Because of the use of the same language in both enactments concerning

"leases," however, the legislative history of the TAPAA is relevant and applicable to the meaning of stripper well "leases" under the EPAA and the implementing CLC, FEO, and FEA regulations.

D. Changes Since Adoption of the Two Tier Crude Oil Pricing System

Several important changes in circumstances have occurred since the initial definitions of "property" and "stripper well lease" were adopted. First, with the passage of time, the natural decline in the rate of production has operated to make the cumulative deficiency provision of the two tier pricing system increasingly more significant. Second, the initial emphasis of CLC on restraining prices and controlling inflation has tended to be of lesser significance compared with the need to provide effective incentives for increased domestic production of crude oil. Third, the price differential between "old crude oil" and crude oil not subject to the ceiling price limitation has increased dramatically, from modest initial levels of $.50 per barrel or less, to amounts of $7.00 per barrel or more. The "old crude oil allocation" or "entitlements" program was instituted in response to this increased price disparity, and since November, 1974, refiners have been required to have an "entitlement" to refine a barrel of old crude oil, with those refiners having more than the national average of old crude oil generally require to purchase such entitlements from refiners having less than the national average of old crude oil. Finally, enactment of the EPCA on December 22, 1975, effectively changed the crude oil pricing program from one which was expected only to be temporary to one which would be mandatory for at least 40 months.

The amendments to the crude oil pricing regulations adopted to implement the crude oil pricing policies of the EPCA are intended to reflect these changed circumstances. Under the two tier pricing system as revised effective February 1, 1976, existing cumulative deficien-

cies were eliminated for all properties. Also, provisions were subsequently added to take into account the natural rate of production decline in future months, so that the level of production which must be exceeded before crude oil produced from a property may be sold at upper tier prices (the "base production control level") may be adjusted downward at six month intervals. These provisions were added to help keep the incentive of higher, upper tier prices within the reach of producers of most properties, so that measures taken to increase rates of production could realistically be expected to result in upper tier prices without regard to the time that has elapsed since the initial base production control levels were first established. Also, the "released crude oil" provisions which were included in the initial two tier pricing system as a special incentive for increased production in the short term were eliminated on a prospective basis, and base production control levels are now determined with reference to the average monthly volume of "old crude oil" produced and sold from each property in 1975.

E. General Considerations

Because the considerations involved with respect to past applications of the term "property" are significantly different from the considerations involved in prospective applications of the term, FEA has concluded that the clarifications that are appropriate with respect to past applications of the term are likewise different from those which are to be applied on a prospective basis. With respect to past interpretations FEA is, of course, bound to formulate those clarifications which are most consistent with the purpose and intent of the regulations in effect during that time, whereas with respect to future applications of the term, FEA enjoys greater latitude to make such prospective adjustments in the meaning of the term as will best suit the current objectives of the two tier pricing system.

In seeking at this time to clarify the meaning of a term that has been so widely applied for almost three years, FEA has sought, first, to determine the legal significance of the words used to define the term and, second, to identify and evaluate the extent to which other factors (extrinsic to the language of the definition itself) may have made it inequitable or impracticable to apply the literal meaning of that definition in certain circumstances. With this intention, and based upon the comments received in this proceeding, therefore, FEA has concluded that the literal meaning of the term "property," as defined by FEA, is generally to be understood as synonymous with the physical "tract" or "premises" as to which a working interest is established by an oil and gas lease, or by a fee interest. It has also concluded that in certain instances it is permissible to segregate the interest so described for purposes of delineating an FEA "property," while in other instances the aggregation of such interests to form a single FEA "property" is appropriate.

The conclusion that the term "property" (i.e., "the right which arises from a lease or from a fee interest to produce domestic crude petroleum") is, in the strictest sense, generally synonomous with the tract or premises as to which a right to produce exists pursuant to an oil and gas lease or a fee interest, is based in large measure on the foregoing review of the history of these concepts.

Although the evidence is not unambiguous, FEA has concluded that CLC by its definition of the term "property" intended to refer to the premises described in the oil and gas lease pursuant to which crude oil was being produced. It also appears that this is the reasonable meaning of the definition that CLC used and that the definition should have been so understood. Thus, when CLC first proposed the two tier concept, it described the productive entity with respect to which production was to be measured as "a particularly property on which

the producer has leased production rights." Use of the phrase "property on which" suggests that CLC contemplated that crude oil production would be measured according to the surface acreage, or "tract," as to which a producer had obtained production rights through an oil and gas lease. (Such leases typically describe the premises by surface boundaries, although they may also delineate particular underground strata as to which rights are conferred. (See e.g., 3 Williams and Meyers, § 665).)

When the two tier pricing system was adopted, property was defined, as noted above, as "the right which arises from a lease or a fee interest to produce domestic crude petroleum." The term "lease" has been generally defined, for purposes of oil and gas law, as "[t]he instrument by which a leasehold or working interest is created in minerals. . . ." Williams and Meyers, Manual of Oil and Gas Terms at 240-241 (3d ed. 1971). "Working interest" has been defined, in turn, as "[t]he operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land. . . ." (Id. at 511.)

Inasmuch as the lease is the basic document of the oil and gas industry, there should have been no doubt but that CLC intended by its definition of property to signify the premises described by an oil and gas lease (or by a deed, in those comparatively few instances in which the operator was also the owner of the mineral interest). FEA believes that this term, which has generally uniform historic meaning throughout the crude oil production industry, was used initially with the intention and expectation that it would provide a uniform basis for application of price controls throughout the industry and would avoid the need for taking into account the varying state regulatory concepts and internal systems of accounting.

Also relevant to the intent with which CLC used the term is that the concept of released crude oil was specifically designed as an incentive to increased production over a relatively short time. The fastest means of increasing production was through maximum exploitation by producers of tracts subject to their working interests —whether by application of enhanced recovery techniques, re-working of wells, or by re-completion of wells in new producing formations. The treatment, for example, of separate reservoirs subject to the same oil and gas lease as separate properties would have been inconsistent with the objective of the released crude oil concept to provide producers with maximum incentives to exploit to the fullest extent the tracts which were subject to their existing rights to produce crude oil.

The evidence with respect to the legislative treatment of the term "lease" is not inconsistent with this conclusion. FEA's review of the legislative history of the stripper well lease exemption indicates that the sponsor of the stripper well lease exemption used the "lease" as the unit of measurement simply bcause the production of several wells subject to a single lease is commonly commingled in one or more storage tanks. He proposed that the stripper well exemption be "decided on a lease basis," rather than on some other basis, solely because of the practical necessity inherent in the common collection and storage systems in use. Thus, a well-by-well measurement would not normally be possible on the one hand and, on the other hand, averaging per well production across an entire field, to the extent a field "went beyond" or was broader in scope than a lease, was presumably not desirable because it would in some cases have unnecessarily expanded the scope of the exemption to leases that were not marginal and in other cases would have unnecessarily prevented marginal leases from benefiting from the exemption. The term "lease" therefore appears to have been regarded as the most appropriate term available to describe an interest that would

typically encompass more than a "well" but less than a "field." It also appears that the term was regarded to be commonly understood as no definition was included in the Act.

However, notwithstanding the strong support, both in the legislative history and elsewhere, for a literal interpretation of the definition of property, FEA has determined that the clarification of past applications of the property concept should recognize more flexibility because of a variety of circumstances under which an interpretation of the term property that was limited to the literal meaning of the language of the definition would be inequitable. Several considerations led to this conclusion.

As noted in the foregoing review of the concept of property and its significance under the two tier price system, the term "property" was first defined in regulations which were issued on August 17, 1973, and became effective on August 19, 1973. Thus, producers were required immediately (*i.e.*, by the end of August) to apply the new definition to their particular circumstances to determine whether any "new" or "released" crude oil had been produced from a property in that month. While the definition of the term appears to have been premised on the assumption that it would provide a common and easily-understood basis for delineating appropriate productive entities, comments received in this and other proceedings indicate that there have, in fact, been many differing interpretations of the meaning of the term among producers.

With respect to the extent to which differing and possibly conflicting interpretations of the term should be recognized by FEA as consistent with the regulations, it must be recognized that producers had no detailed guidance initially from CLC, FEO, or FEA with respect to the numerous questions that arose with respect to the property definition. The first ruling on the definition of

property was not issued until August 29, 1975 (FEA Ruling 1975-15, 40 FR 40832, September 4, 1975). Further, when the CLC definition of property had to be adapted by producers to their particular circumstances in August, 1973, the benefits or detriments of alternative approaches, to the extent they may have been considered, would have been perceived much differently than at a later time.

It should be recognized, for example, that the two tier pricing system initially operated generally to provide an economic incentive for the aggregation of productive entities if one such entity was capable of producing significantly higher volumes of crude oil than it produced in 1972. This is because there had not yet been time for significant current deficiencies to accumulate as to most productive entities, and the increased production from one entity, if sufficient, would serve under the special release rule to release from the ceiling price rule crude oil from other productive entities only if they were treated as part of the same property. Of course, to the extent that any cumulative deficiency had accrued at that date, selective segregation of entities would have served immediately to result in all "new crude oil" from any separate entity with respect to which production was just being initiated. As a general matter, however, it seems unjust, with the benefit of hindsight, to ascribe now improper motivations to applications of the property concept which were made under considerably different circumstances nearly three years ago.

Also favoring a more flexible interpretation of past applications of the term property is the reality of several significant consequences attached to the determinations that have been made with respect to the meaning of the term "property." Volumes of "old," "new," "released," and "stripper well lease" crude oil are a function of the scope of the "property" as determined by the producer. "Old" crude oil volumes, thus determined, have

been certified, and entitlements have been purchased by refiners with respect to such volumes. The costs of the crude oil and entitlements to refiners have, in turn, generally been passed through in prices charged for refined products. Revenues paid to producers have, in like manner, generally been used to pay operating costs or to initiate enhanced recovery or new exploration and development, and remitted to royalty owners, or otherwise disposed of. In addition, since February 1, 1976, the "base production control level" of each property has been defined by reference to the volume of "old crude oil" produced and sold from the property concerned during 1975.

FEA recognizes the substantial reliance that has been placed on these determinations by numerous parties, that there is no basis for concluding in general that such determinations were other than good faith attempts to comply with the regulations, and that there is a substantial need for a measure of administrative finality to attach to as many of these determinations as possible, so as to avoid substantially disruptive retroactive adjustments.

The legislative history of congressional intent with respect to the meaning of "lease" in the context of the stripper well lease exemption is not inconsistent with the need to afford some measure of flexibility in the definition of the term "property." The Conference Report accompanying the TAPAA states that "Congress . . . intends that the regulations provide appropriate limitations and provisions in the definition of 'lease' to insure that an administratively workable system is established which does not permit abuse." This statement clearly indicates that rigid adherance to a "lease" system was not expected and that the necessity for some degree of flexibility in defining the term was acknowledged. Consistent with this intent, the regulatory definition of a stripper well lease provided for, among other understand-

able exercises in flexibility, inclusion of "fee interests" within the meaning of the statutory term "lease."

The strictures in the Conference Report on the subject of stripper well "gerrymandering" do not contradict this view. The only express qualification on administrative flexibility in defining "lease" would seem to be one which would be present by implication in any event (i.e., that the administrative treatment of the term "lease"—as in any other phase of administering the stripper well exemption—must not be such as to permit abuse of the exemption).

On the other hand, FEA does not regard its ability retroactively to provide for a more flexible interpretation of the term property to be unqualified. Principles of equity generally favor that those who are similarly situated receive comparable treatment. In this regard, it would be particularly inappropriate for those producers which closely adhered to the regulatory definition of the term "property" to be treated much less favorably than those producers which interpreted the term in a less formal manner. Moreover, FEA is also concerned that unwarranted departures from its regulations not be permitted and that the interests of consumers in full and fair enforcement of the price controls on crude oil be adequately protected.

Accordingly, the detailed discussion setting forth the proper clarification of past applications of the property concept in the following Section I. F. represents FEA's attempt to strike an appropriate balance between the foregoing considerations as to a literal interpretation of the term property vis-a-vis a more flexible interpretation which takes into account factors extrinsic to the language of the definition itself.

FEA believes that the clarifications adopted today are consistent with the practices that have been followed by

the substantial majority of producers. However, to the extent that these clarifications would permit any producer to calculate larger volumes of "new," "released," or "stripper well lease" crude oil than were calculated and certified in prior months, no recertifications of additional volumes will be permitted. Such recertifications will be considered, if at all, only on a case-by-case basis on normal grounds of inequity or hardship through the FEA exceptions process. FEA is aware that in so affording significance to differing good faith definitions of property that have been adopted by producers, similarly situated persons will in some instances be treated differently under the regulations. This fact is, however, counterbalanced in FEA's view by the need for the greatest possible measure of administrative finality to be afforded the determinations already made as to volumes of old crude oil. Appropriate compliance actions will, of course, be taken with respect to applications of the term property which are not consistent with the clarifications set forth herein, to the extent that they have resulted in the certification of greater volumes of new or upper tier crude oil than is permitted. FEA reserves the right in such compliance actions to determine whether any misapplication of the "property" concept, which resulted in improper classification of lower tier crude oil as upper tier crude oil to a particular purchaser, also resulted in that purchaser receiving at lower tier prices other volumes of crude oil that could properly have been certified as upper tier crude oil. In such cases, and in the context of formal compliance action (i.e., by remedial order or consent order), FEA may permit the producer to recertify such amounts of crude oil mistakenly invoiced as lower tier crude oil, but only to the extent that additional funds due the producer because of such recertification do not exceed refunds due to the purchaser because of sales of crude oil by the producer at prices in excess of the appropriate ceiling prices.

F. Past Applications of the Term "Property"

The issues with respect to past applications of the term property may, for purposes of convenience, be generally divided into three categories: (1) Those involving the delineation of the premises which are subject to a single "right to produce" pursuant to a lease or fee interest, (2) those involving the aggregation of two or more such premises, and (3) those involving the segregation of such premises subject to a single "right to produce."

(1) *The right to produce.* Ruling 1975-15 made it clear that the property concept is one that begins with "the right *to produce crude oil.*" Consistent with the discussion above of the common meaning of that term as being generally synonomous with the concept of "working interest," the analysis of property will generally begin with identifying the one or more "premises" or "tracts" described in the instrument that confers the right to produce. Generally speaking, except in those cases where the right to produce is conveyed separately with respect to separate horizontal strata, the "premises" as to which the right to produce exists will generally be described in terms of surface acreage—commonly referred to as a "tract." In those instances in which production is undertaken by the owner of the mineral interest in fee, rather than by a lessee, the instrument conveying the fee interest will similarly describe the premises typically in terms of surface acreage, also referred to as a "tract." The terms "premises" and "tract" are both used here to refer to the physical limits as to which a right to produce exists. Since "tract" implies surface acreage, whereas "premises" is not so limited (but also signifies use of three dimensional boundaries), the latter term is preferred.

Difficult issues can arise with respect to construing a lease or deed to delineate the one or more premises as to which a "right to produce" exists under that in-

strument. This can occur, for example, where a lease conveys a right to produce with respect to described premises, but imposes differing or special rights or obligations with respect to the development of and production from particular portions of the described premises. Generally speaking, where the rights or duties created under a single instrument are significantly different with respect to particular identified portions of a described premises, where a producer has in good faith relied upon such differences in its exploration and development activities, and where the producer has consistently and historically accounted for such portions separately, FEA will permit the lease concerned to be considered as having established more than a single "right to produce" and, consequently, more than a single property. Thus, for example, where the time within which a lessee is obligated to begin production activities varies as to specified portions of a particular tract, those portions of the tract would be subject to differing "rights to produce," and hence, could constitute separate "properties."

(2) *Segregation of premises subject to a single right to produce.* More complex issues are posed with respect to the extent to which the premises subject to a single right to produce may appropriately be subdivided to form separate "properties." As noted above, there are instances in which a single lease may create several distinct "rights to produce" with respect to specified portions of the premises described therein. And as discussed below, the aggregation (with premises subject to other rights to produce) of less than all of the premises covered by a single right to produce may result in the subdivision of the premises formerly subject to a single right to produce into at least two properties—the portion which has been aggregated and the portion which remains. There are, however, still further instances in which segregation into one or more properties of a premises subject to a single right to produce appears to have been appropriate under the existing regulations.

a. *Non-contiguous tracts.* One such instance is in the case of non-contiguous tracts. Particularly in the case of fee interests, but also in the case of certain large leases (typically old leases), a single instrument may convey a single undifferentiated right to produce with respect to multiple, non-contiguous tracts, which may be located at great distances from one another. In all cases in which it can be shown that such non-contiguous tracts were developed and produced separately, and where they have historically and consistently been accounted for as separate properties, FEA will continue to permit them to be so regarded. The basis for this determination is principally that FEA understands this to have been a consistent and historic practice and one which was followed to conform the treatment of the atypical situation of multiple tracts subject to a single instrument to that afforded in the more typical situation of a single tract subject to a single lease.

b. *Very large tracts.* Another such instance is in the case of very large tracts which are subject to a single right to produce. Although this problem appears to exist mainly with respect to large fee interests, it also obtains with respect to certain large leases, particularly those granted many years ago by Federal and state governments. As noted above, the modern oil and gas lease typically conveys a right to produce which must be exercised within a specified period in order for production rights to be retained by the lessee. The objective of the lessor is to obtain production in a specified area within a specified time. Accordingly, most oil and gas leases confer a right to produce as to an area within which exploration and development by the lessee can reasonably be expected within a reasonable time—five years is typical.

Owners of mineral interests in fee which undertake their own exploration and development activities are not, of course, bound by any lease obligations with respect to the time within which such activities must take place.

Accordingly, exploration and development of a large fee interest may take place over an extended period of time, in much the same manner as if several leases had been conveyed with respect to particular areas and time periods. Similarly, with respect to large leases, a comparable form of phased development may have taken place. Indeed, as to certain large government-granted leases, a "selection" process has been employed, whereby only with respect to those portions of the lease that are developed does the lessee retain production rights. In such cases, the right conveyed by the initial "lease" is more in the nature of a right to explore, which ripened into a right to produce those areas that the lessee has developed in a timely fashion.

In order to treat holders of large tracts subject to a single right to produce—whether by a lease or by fee interest—in a manner that is comparable to the treatment of those who hold a right to produce under the more limited typical modern oil and gas lease which covers a lesser area, FEA has concluded that separate geological formations subject to the same right to produce which have been developed and produced separately, and which have historically and consistently been accounted for separately may continue to be so regarded.

c. *Partial unitization or other aggregation of interests.* It is not uncommon for less than the total premises subject to a right to produce to be unitized or otherwise aggregated with all or portions of premises subject to other rights to produce, to form a single "property," leaving the balance of the premises formerly subject to a single right to produce not aggregated with any other such rights. The portion of the premises which is not aggregated is appropriately recognized as a property separate and apart from the portion of the premises which has been aggregated with other rights to produce.

In some cases, FEA understands that the inclusion of the so-called "Pugh" clause in a lease would operate

to create a separate and distinct right to produce with respect to the non-unitized portion of the premises subject to that lease, by stating that production from the unitized portion of a lease will not serve to fulfill the lessee's production obligations with respect to the non-unitized portion. Thus, the two portions of the lease including such a clause would become separate properties by the terms of the lease itself. However, even where such a clause is not included, FEA has concluded that treatment of the non-unitized portion of the premises as a separate property is appropriate.

d. *Severance tax or royalty owner accountability.* Another instance in which segregation of a premises subject to a single right to produce is appropriate is where the production from identifiable portions of the premises is required to be measured and accounted for separately for purposes of determining severance tax liability or for purposes of accounting to royalty owners. FEA has concluded that where the payment of revenues to state tax authorities or to royalty owners requires separate accounting for production from identified portions of a premises subject to a single right to produce, and where such a portions of the premises have consistently and historically been treated as separate properties, such separate treatment may appropriately be continued.

e. *Other segregation not permitted.* The most complex and apparently controversial issue with respect to segregation of a premises subject to a single right to produce has to do with production from separate "reservoirs." FEA has studied this issue at considerable length but has been unable to find a solution which is likely to be satisfactory to all parties concerned. FEA has concluded on the basis of the review of the legislative and regulatory history and the general considerations outlined above that a premises which contains multiple reservoirs

but which is subject to a single right to produce may not, simply by virtue of the existence of separate reservoirs, be treated as comprising multiple "properties."

FEA does not believe that the language of the definition of the existing term "property" can be construed to mean that production from separate reservoirs subject to the same working interest would, simply by virtue of the fact that the several reservoirs have been developed and produced separately, be regarded as production from separate properties. (Producers have been on express notice of this at least since the issuance of FEA Ruling 1975-15 on August 29, 1975.) Moreover, any producer which adopted a reservoir-by-reservoir approach to the definition of property (and, hence, to the computation of amounts of "new" and "released" crude oil) would typically have been in a position to achieve greater benefits under the price regulations over the past three years than those producers who took the approach of aggregating production from all reservoirs subject to the same right to produce, as required under the regulations. At least until February 1, 1976, any producer that treated each reservoir as a separate property automatically would have obtained "new" crude oil whenever production was obtained from a new reservoir. Producers using the lease approach, on the other hand, were required first to exceed 1972 levels of production from the lease concerned before any production from a new reservoir would be regarded as "new" crude oil. FEA has unfortunately not been able to obtain any approximation of the extent to which producers have actually adopted a reservoir-by-reservoir definition of property.

Under these circumstances, FEA has concluded that it would be inequitable to permit producers who took an expansive—and, in FEA's view, unwarranted—view of the meaning of the term property to obtain benefits that were not afforded to producers who adhered closely to the regulations. Thus, FEA has concluded that sep-

arate reservoirs which are subject to the same right to produce will generally not be treated as separate properties under existing regulations.

There are, however, instances in which for a variety of reasons, it would have been impracticable or inequitable for producers not to have treated separately production from a separate reservoir or reservoirs. Those instances of which FEA is aware have been noted above. There may well be other instances of which FEA is not aware, but which may be appropriately addressed in subsequent rulings, as they become known. The mere existence of separate reservoirs and the requirement to report separately the production from such reservoirs in itself will, however, only suffice to permit separate property treatment if the producer has applied for exceptions relief and has been permitted to use such a definition in order to avoid serious hardship or gross equity.

(3) *Aggregation of "rights to produce."* The aggregation of separate "rights to produce" pursuant to a unitization agreement was discussed in FEA Ruling 1975-15. There are, however, other circumstances under which separate rights to produce may appropriately be aggregated, pursuant to either voluntary or involuntary arrangements.

Thus, for example, various parties may hold partial undivided interests in the right to produce crude oil from a particular tract. Whether voluntarily through a joint operating agreement or other type of agreement, or pursuant to compulsory state regulations, such undivided interests in the right to produce from a tract must typically be aggregated before production can begin. Under such circumstances, no apparent purpose would be served by requiring property delineations to be carried back to the individual partial undivided interests which have been aggregated in order to perfect the right to produce.

Another instance in which rights to produce may be aggregated occurs where the premises subject to such rights are required to be combined by a state regulatory agency as a condition to the operation of production activities. Thus, for example, in Louisiana the state regulatory agency will compel a "unit" to be formed by the owners of the tracts with respect to the surface area which overlies the portion of a reservoir that may be efficiently drained by a single well, provided the owners of at least 75 percent of the surface area agree to the formation of a unit.

Similarly, in states that maintain spacing requirements for oil wells, individual rights to produce may need to be combined, whether voluntarily or involuntarily, before a single well may be drilled and the right to produce made effective. Such aggregations of rights to produce, sometimes known as "drilling units") are also appropriately recognized as single "properties."

Generally speaking, FEA will follow a liberal policy with respect to the aggregation of rights to produce which will be permitted to be treated as a single "property," as long as a bona fide reason for the aggregation can be demonstrated by the producer.

G. *Prospective amendments to the term "property."* The issuance by FEA of Ruling 1975-15 engendered significant comment, primarily from crude oil producers urging FEA to adopt a property concept that would recognize as separate properties each producing reservoir underlying a lease. Since that time, FEA has undertaken an analysis of the property concept as conceived and first implemented by the Cost of Living Council (and set forth in some detail in Part A above), and concluded preliminarily that the incentives offered under the tract-by-tract concept were better suited to the temporary program envisioned by CLC, but that in the more than two years since the two tier system was first implemented those incentives had decreased in impact or

effectiveness. Accordingly, on January 6, 1976, in connection with the first stage of rulemaking proceedings to implement the crude oil pricing policy of the EPCA, FEA proposed for comment an amended definition of property (to have been applied prospectively, effective February 1, 1976) that would have recognized the existence of separate properties under the same tract, where the tract encompassed separate and distinct producing reservoirs. When final regulations were adopted on February 1, 1976, FEA rejected the proposal and generally indicated

> (1) the uncertainty over the effect of such an amendment on the relative proportions of old, new, and stripper well lease crude oil; and
>
> (2) the likelihood of enormous administrative problems associated with determining the limits of thousands of different reservoirs.

Comments submitted in connection with the first stage proceeding either did not address these concerns, or tended to confirm FEA's belief that data sufficient to make such determinations were generally unavailable.

However, after issuance of the February 1 amendments, FEA again received a significant number of inquiries and comments, urging reconsideration of the proposal to establish a property concept based upon separate reservoirs. Accordingly, as part of the continuing analysis of the property issue, FEA again reviewed this matter so as to formulate for public comment a proposed revision of the property concept. In this regard, FEA sought a concept that would optimize the incentives under the two tier system in a manner that is administratively feasible for FEA and that would facilitate compliance by crude oil producers.

The resulting proposal, as set forth in the April 13 Notice, was to afford under FEA regulations the maximum practical significance to pre-existing state regula-

tory concepts and historical accounting systems that have been developed within the framework of the various state regulatory concepts. With this goal in mind, FEA solicited comments in the April 13 Notice and indicated its intention to consider the adoption of retroactive amendments and the issuance of rulings, as well as the adoption of prospective amendments, to the extent that such actions were determined to be appropriate in resolving the issues under consideration. The discussion in Part F above represents the formal interpretation of FEA of the definition of property as promulgated by CLC and carried forward by FEO and FEA, and will be applied until the amendment discussed below becomes effective on September 1, 1976.

Although a number of different property concepts were discussed in the comments received in connection with this proceeding, most commenters still seem to favor reservoir-by-reservoir determinations. Under such an approach, each non-unitized reservoir or portion of a reservoir underlying each tract would constitute a separate property. Some producers have argued that this is the best approach because it would provide the greatest incentive to develop new reserves and maintain production of existing reserves. The incentive would arguably be maximized under the reservoir approach because decisions regarding the exploration for and development of crude oil reserves could be made on an individual reservoir basis without regard to the happenstance of production characteristics of other reservoirs underlying the same tract. It follows that a producer would more likely search for and develop new reserves (or increase the development of certain existing reserves) if the producer could be assured that resulting increased production would qualify as upper tier crude oil.

A property concept that follows tract boundaries, on the other hand, without regard to the separate reservoirs which may underlie the tract, may not provide

appropriate incentives under the two tier pricing system. This is because increased production from one reservoir may fail to qualify as upper tier crude oil because of the requirement that tract production must exceed the BPCL and cumulative deficiency determined from all reservoirs that underlie the tract.

For example, a producer holds the right to produce crude oil from tract X under which are situated four separate and distinct reservoirs, with production figures as set forth in Table 1 below:

TABLE 1

Reservoirs	1972	1973	1974	1975	1976
A	11,000	8,000	5,000	3,000	1,000
B	7,500	5,000	4,000	3,000	2,000
C	0	0	11,000	10,000	9,000
D	0	0	0	0	.....
Totals	18,500	13,000	20,000	16,000	12,000

As Table 1 indicates, the incentive intended to be provided by the CLC has diminished over time. While the producer was able to respond to the short term incentive by developing production from reservoir C and thereby exceeding the property's BPCL in 1974, the continued decline in production from reservoirs A and B makes remote any incentive in 1976 or later to develop production from reservoir D. Under a reservoir-by-reservoir determination of upper and lower tier crude oil, however, production from reservoir C would continue to qualify as upper tier crude oil, as would any production from reservoir D.

The merit in a property concept that recognizes separate reservoirs (to some extent at least) is undeniable. However, an unqualified reservoir-by-reservoir concept is largely administratively infeasible. First, unitizations aside, crude oil accounting has consistently and histori-

cally had some relation to the lease because it is the lease that in the first instance describes ownership interests. Accordingly, a true reservoir-by-reservoir concept would require the establishment of reservoir BPCL's without regard to producing interests, and would force producers to determine production on a reservoir basis in the same manner as is done for unitizations, but where there is no agreement among various interest holders for that purpose. Moreover, additional problems would be encountered due to differences among various lease operators of the same reservoir.

Accordingly, the reservoir concept that FEA proposed in the January 8 Notice was one which would have recognized separate reservoirs underlying the same tract. In this way, it was thought that a system would result that benefited from the best aspects of a reservoir concept but which remained subject to the legal requirements entailed by the tract concepts.

As noted above, the January 8 proposal was not adopted primarily because FEA concluded that it would be infeasible to attempt to administer a program under which FEA could not require easily understandable records from which could be determined the limits of each producing property. FEA has neither the expertise nor the resources required to monitor reservoir-by-reservoir production, and FEA auditors would not have at their disposal adequate means to confirm or deny that production had in fact resulted from two or more separate and distinct producing reservoirs.

This problem would be minimized if FEA could defer to other expert agencies to make reservoir-by-reservoir determinations. For this reason, FEA proposed in this proceeding to recognize the existence, as separate properties, of each separate and distinct producing reservoir underlying the tract, to the extent that such reservoirs have been recognized by the appropriate state regulatory body, and production is separately reported as such.

While many comments evidence a continued preference for a property definition that would recognize each reservoir regardless of state recognition, vel non, most comments indicated approval of the tentative conclusions set forth by FEA in the April 13 Notice. Therefore, effective September 1, 1976, the definition of property is amended to recognize as separate entities, each reservoir underlying a tract, to the extent that the reservoir is recognized by the appropriate state regulatory body, and production has been consistently and historically reported as such. The following guidelines are set forth to aid producers in making property determinations effective September 1, 1976.

(1) *Unitizations.* Where two or more tracts, or parts of two or more tracts, are unitized so that production is undertaken from the reservoir as a single unit, the reservoir, as unitized, constitutes the property. In most cases, the unitization of several tracts is accomplished by a unitization agreement, which describes the unitized reservoir and is submitted to the state regulatory body for prior approval. The method of determining upper tier crude oil volumes from unitized properties was addressed in Ruling 1975-15. The ruling did not, however, address an important aspect of unitization that has given rise to several questions from producers.

A unitization, as stated in Ruling 1975-15, constitutes a single property, but nonunitized production, if any, from each of the participating tracts continues to be accounted for on a tract-by-tract basis. This should mitigate some of what producers have perceived as the harshness of the requirement that unitization requires the accumulation of BPCL's from all participating tracts. The ruling is, therefore, amended by this Notice to make it clear that only that part of each tract's BPCL attributable to the unitized reservoir is accumulated to determine the new unit BPCL so that no participating tract carries into the unit an unrepresentatively high

BPCL. For the non-unitized portion, if any, of each tract, the tract-by-tract rule discussed below is operative. (The allocation of a BPCL—which was formerly attributable to the entire tract—between the unitized and non-unitized portions of the tract would be made in the same manner as is discussed below with respect to implementing the reservoir-by-reservoir property definition, effective September 1, 1976.)

It has become evident during the course of this rulemaking that there has been some confusion resulting from the various meanings which may be attributed to the term "unit," which has two generally-accepted meanings: (1) The total area incorporated in a unitization agreement; and (2) the acreage allocated to a particular well. (See Williams and Meyers, Manual of Oil and Gas Terms at 484.) The rule discussed above applies to unitizations (the combining of all or parts of two or more tracts in order to operate the reservoir as a single productive unit subject to a single operating interest), and not to "spacing units," which merely define the minimum acreage allotted to a single well within the confines of a single tract. With respect to "drilling units," a term that is sometimes used to signify the forced pooling of two or more small tracts into sufficient area to meet the spacing requirement, the drilling unit will constitute the property if it is recognized as such by the state body, and production is reported as such.

(2) *Determination of base production control levels.* Because the amendment to the property definition adopted today is expected in many cases to result in a recalculation of BPCL's where the amended definition of property results in a greater number of producing properties for any producer, the following guidelines are set forth to aid producers in making those recalculations.

For each non-unitized tract, the producer should first determine how many properties are contained within that tract. If the tract produces only from one reservoir

the tract constitutes the property and the BPCL, as previously calculated under FEA price regulations, remains the same. This will be true even though the producer may have reason to believe that crude oil has been produced from two or more separate reservoirs under the tract, but where no such separate recognition has been accorded the reservoirs by the state regulatory authority.

However, where the tract encompasses more than one producing reservoir, each of which has been recognized by the state regulatory authority as a separate and distinct reservoir, each may be treated as a separate property under the amendment adopted today, in which case a BPCL must be determined for each property. This should be done as follows:

(A) Reservoirs (properties) from which there was no production and sale of crude oil in 1972 will have a BPCL of zero;

(B) For reservoirs (properties) from which there was production and sale of crude oil in 1972, the producer will recompute levels of new, released, and old crude oil (since September 1, 1973) for each reservoir in order to determine revised levels of old crude oil for each reservoir in calendar year 1975. In this way, for each state-recognized reservoir (property) within the tract, the producer will be able to determine the production and sale of old crude oil in 1975, and hence a revised BPCL.

Although such calculations will need to be done for as far back as September 1973, no recertification of new crude oil is intended and none will be permitted. Such recalculations are to be done only for the purpose of establishing new BPCL's, where needed, effective September 1, 1976.

FEA is aware that the amended definition of property adopted today is likely to result, effective September 1,

1976, in the reclassification of some volumes of old crude oil as new crude oil. This will occur for some properties where the recalculation of BPCL's on a reservoir basis will result in the classification as new crude oil of some volumes that had (under the previous definition) been used each month to offset production from other reservoirs which had declined since the base year.

With respect to any amendment to the regulations that would permit an increase in the price for any volume of "old crude oil production" (as defined in section 8(b)(3) of the EPAA) after December 22, 1975, section 8(b)(2) of the EPAA requires the President to find that such amendment—

(A) Will give positive incentives for (i) enhanced recovery techniques, or (ii) deep horizon development from such properties; or

(B) Is necessary to take into account declining production from such properties; and

(C) Is likely to result in a level of production from such properties beyond that which would otherwise occur if no such amendment were made.

The FEA finds that the amendment adopted today comports with all three of the objectives set forth in section 8(b)(2). To the extent that producers elect to treat separate reservoirs as separate properties, an incentive is provided to develop new deep reservoirs which would result in all new crude oil production. Moreover, the amendment adopted today removes the disincentive some producers faced with respect to properties where declining production from existing reservoirs offset new production from other reservoirs which would otherwise have qualified for treatment as new crude oil. To the extent that this disincentive is eliminated, the amended definition of property is likely to result in production from those reservoirs which would not otherwise have occurred under the previous property definition.

II. The Definition of "Posted Price"

FEA price regulations employ historical crude oil posted prices as references for determining lower and upper tier ceiling prices, with lower tier ceiling prices determined by reference to the highest posted price for the same grade of crude oil in the same or nearest field on May 15, 1973, plus a per-barrel increment, and with upper tier ceiling prices determined by reference to the highest posted price for the same grade of crude oil in the same or nearest field on September 30, 1975, less a per-barrel increment.

The definition of "posted price" was adopted by the Cost of Living Council on November 30, 1973, and has remained substantially unchanged since that time:

> "Posted price" means a written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field in accordance with historic practices, and generally known by sellers and buyers within the field. (38 FR 33577 at 33578, December 6, 1973.)

Although FEA has until this time issued no interpretive ruling with respect to this definition, the posted price concept has served as the basis for determining lower tier ceiling prices for nearly three years.

On February 1, 1976, in connection with the first stage of rulemaking proceedings to implement the crude oil pricing policy of the EPCA, the FEA rejected its proposal (41 FR 1564, January 8, 1976) to determine upper tier ceiling prices by reference to actual transaction prices, and decided instead to determine upper tier ceiling prices with reference to highest posted prices on September 30, 1976. Most of the comments submitted in the first stage proceeding indicated that postings were prevalent in September 1975, and suggested that the use of field-wide September postings would avoid other difficulties inherent in FEA's proposal to base upper tier

ceiling prices upon actual transactions (*e.g.*, the need to establish a price where there had been no production and sale of crude oil from the property concerned in September 1975).

After publication of the February 1 amendments, however, a substantial number of inquiries were received by FEA relative to the correct application of the posted price concept to the determination of upper tier ceiling prices. (To a much lesser extent, inquiries were also received relative to the posted price for purposes of determining lower tier ceiling prices. However, the problem was said to be not as prevalent with respect to lower tier ceiling prices due to the relative uniformity of crude oil prices in May 1973.) Accordingly, FEA determined that comments should be received in this rulemaking in order to determine whether any clarifications were necessary with respect to the definition of posted price. Notwithstanding the clearly expressed purpose of the rulemaking in this regard, however, a large number of written and oral comments suggested that FEA either (1) depart from the posted price concept in favor of the actual transaction approach that was specifically rejected on February 1, or (2) interpret the definition of "highest posted prices" as the "highest prevailing price," so as to include within the definition actual transaction prices that prevailed on September 30, 1975. After consideration of all the written and oral comments FEA has determined that while amendments to the current definition are unnecessary, the following clarifications should resolve any confusion that persists with respect to the posted price concept.

Prior to the implementation of price controls by CLC, the traditional and historical operation of the crude oil market included the use of posted field prices, a mechanism well known among buyers and sellers of crude oil throughout the world as

> The announced price at which a crude oil purchaser will buy the oil (of specified quality) from a field. At one time, the price was actually announced by a statement posted in the field. [More recently], the announcement is usually made in the newspapers. (*Williams and Meyers, Manual of Oil and Gas Terms* at 339.)

The general practice among principal purchasers has been periodically to issue price bulletins, which are widely circulated to the public, announcing the price that that particular purchaser would pay for a particular grade crude oil in a particular location.

It was in this context that CLC adopted the two tier pricing system in August 1973. In the Notice of Proposed Rulemaking issued on July 19, 1973, CLC indicated that the ceiling price for crude oil was to be "the price posted on May 15, 1973 for each grade of petroleum from each particular field." (38 FR 19464 at 19467, July 20, 1973.) The posted price concept was selected because the ready availability of price bulletins (which were understood to be in normal circulation in May 1973) provided a mechanism whereby producers and purchasers alike could be able to determine the ceiling price for any grade crude oil in any particular field. Moreover, the use of price bulletins avoided the enormous administrative complexity of having to establish ceiling prices that would maintain traditional gravity and quality price differentials.

Although the August 17, 1973 Subpart L Petroleum Price Regulations did not contain a definition of posted price, a definition was adopted by CLC on November 30, 1973 to make it clear "that a posted price must be a publicly circulated written offer to purchase." (Emphasis added, 38 FR 33577 at 33578, December 6, 1973.)

Although the CLC definition did not require the formality of a printed price bulletin such as is published by

major purchasers, the CLC did require the formality of a "publicly circulated written offer." The requirement that the offer be in writing eliminates verbal offers, and the requirement that the written offer be publicly circulated eliminates offers (even though written) to specified producers. Accordingly, other than the published price bulletins of the type traditionally issued by major oil companies, FEA will only recognize as a "posted price" written offers to purchase only so long as they were bona fide public offers of general applicability to crude oil producers in the field. For example, a letter from a purchaser to all crude oil producers in a field or in an area would constitute a posted price if the letter was understood by producers and the purchaser to be a bona fide offer to purchase from all producers in that field or area. A written contract, of course, would not qualify as a posted price because it represents an agreement between a buyer and specific producer, not a bona fide offer to purchase from all producers.

Accordingly, in determining the "highest posted price," a producer should first determine which offers qualify as posted prices under the definition as interpreted above. The next inquiry is into which of those posted prices were on September 30, 1975 (or May 15, 1973 for lower tier ceiling prices) applicable to the particular field in question. Once that determination has been made the producer simply identifies the highest price offered among qualified postings.

With respect to determining the applicability of specific postings to particular fields, it has become clear that the principal issue relates to the use of the term "field" in the definition of posted price. Buyers and sellers alike indicated that inasmuch as "field" is not a defined term, conflicting September 30, 1975 "highest posted prices" occur in many areas of the country. Specifically, the term field has different accepted meanings and usages in vari-

ous producing areas, and consequently might have been interpreted to mean an area as small as a lease, or as large as one or more entire states. However, for purposes of posting crude oil prices, crude oil producers and purchasers have generally understood the term "field" to signify a general area underlain by one or more reservoirs. For example, while some price bulletins refer specifically to named fields in which the particular price prevails, other types of bulletins specify a price for a particular grade of crude oil, which is produced over a large geographical area—perhaps even over an area of one or more states.

The problem arises where a single price bulletin was issued for an area and grade of crude oil (without specifying particular fields), while a price bulletin was issued by a competing buyer offering a higher price, but specifically limited to certain named fields which do not include all the fields within the larger area referred to in the price bulletin offering a lower price. Resolution of such disputes should be as follows: Price bulletins which specify only a geographical area and crude oil grade (e.g., "West Texas Sour") are presumed to be applicable to every field within the named area, unless a particular field is specifically excluded. However, the existence of a price bulletin stating a higher price for specifically named fields within the same area will, of course, supersede the area-wide price bulletin, for the named field only.

Finally, there should remain no question that posted prices used to establish lower tier ceiling prices, as well as posted prices for upper tier crude oil, do "not include premiums above posted prices which may have been paid for crude purchased on May 15, 1973 [or September 30, 1975] (38 FR 33577 at 33578, December 6, 1973)." This was made clear by CLC in November 1973 and should have been understood since that time.

III. APPLICABILITY OF THE STRIPPER WELL PROPERTY RULE TO CONDENSATE PRODUCED FROM GAS WELLS

Prior to February 1, 1976, 10 CFR 210.32 provided an exemption from price and allocation regulations for the first sale of "crude oil, including condensates, produced from any stripper well lease. . . ." A stripper well lease was defined in § 210.32 as a

> "property" whose average daily production of crude oil, including condensates, per well did not exceed 10 barrels per day during any preceding calendar year beginning after December 31, 1972.

In Ruling 1974-28 (39 FR 44414, December 24, 1974), FEA held that the stripper well lease exemption was inapplicable to condensate produced from gas wells. This issue was subsequently reconsidered in the context of a formal rulemaking proceeding, and on August 29, 1975, FEA determined that, in all respects except the applicability of the stripper well lease exemption to gas wells, Ruling 1974-28 remains interpretive of the price regulations since they were first promulgated (40 FR 40818, September 4, 1975). With respect to the treatment of gas-well condensate for purposes of the stripper well lease exemption, FEA concluded that because of the good faith treatment by producers of gas-well condensate as being eligible for treatment under the stripper well lease exemption prior to the issuance of Ruling 1974-28, FEA would not require gas-well condensate to be excluded from the scope of the stripper well lease exemption until January 1, 1975, so that the impact of Ruling 1974-28 in this respect was made prospective only.

On February 1, 1976, the stripper well lease exemption was deleted from FEA price and allocation regulations pursuant to the removal of the former exemption of the EPAA by section 401(b)(1) of the EPCA. However, FEA determined that in keeping with the congres-

sional objectives embodied in the EPCA, crude oil produced from stripper well leases should qualify for treatment as upper tier crude oil. At that time the definition of a stripper well lease was modified to make it clear that only "crude oil (excluding condensate recovered in non-associated production)" is counted in determining whether the property qualifies as a stripper well lease.

Since the issuance of Ruling 1974-28, certain producers have indicated that some uncertainty exists as to the meaning of the term "gas-well condensate," inasmuch as different state classifications might result in wells having basically the same productive characteristices being classified as a gas well in one state and an oil well in another.

In the August 29 Notice, FEA recognized this issue and stated:

> In order further to eliminate any uncertainty that might have arisen from the [original] regulatory language, conforming amendments are made today, effective January 1, 1975, to the stripper well lease exemption in 10 CFR 210.32 to reflect that the *exemption extends only to crude oil and condensate recovered in associated production.* (Emphasis added, 40 FR 40820.)

Thus, the qualification of a property as a stripper well property is only prohibited to the extent that the property consists of wells having only non-associated production of natural gas and condensates. That is, unless a well produces some crude oil, the well fails to qualify for inclusion as a producing well in the stripper well lease computations.

Therefore, if a well produces from an associated reservoir (i.e., a reservoir in which gas occurs in association with crude oil), that well may be included to determine if the property is a stripper well property only if crude oil is produced from that well. If only condensate is pro-

duced, in association with the gas, the well may not be included to determine if the property is a stripper well property. On the other hand, if a well is producing non-associated gas (i.e., free gas not in contact with crude oil in the reservoir), or only natural gas (even if from an associated gas reservoir), that well may not be included as a producing well because it does not produce crude oil.

To the extent that a single property includes wells of both types, only the wells that produce crude oil may be counted in calculating average daily production. The volumes of condensate produced from the non-associated gas wells are not properly included in the calculation of the property's average daily production.

In this rulemaking, comments were solicited on the extent to which the distinctions outlined above may be made with uniformity in various states. Notwithstanding this specific request, the thrust of most comments was to urge FEA to eliminate the distinction between condensate produced in associated and non-associated production, and to extend the stripper well property provisions to all condensate production. The FEA has rejected these suggestions but is currently considering in the context of the third stage rulemaking to implement the EPCA to adopt a stripper well property rule applicable to condensate recovered in non-associated production. (*See* 41 FR 18873, at 18876, May 7, 1976.)

With respect to the current stripper well property rule, however, the FEA has determined that the distinctions set forth in the April 13 Notice and reproduced here are valid and will continue to serve to determine which producing wells are to be counted for purposes of determining if the property is a stripper well lease.

IV. ENHANCED RECOVERY UNITS

In the amendments adopted February 1, FEA promulgated a new 10 CFR 212.75 ("Enhanced recovery projects on units.") to provide an incentive for producers to

implement enhanced recovery projects on unitized properties. In this regard, FEA rescinded that part of Ruling 1975-15 that required that as of the time a unit agreement becomes effective, current total production and sale of crude oil from the unit must exceed the total base production control levels for all the participating tracts before any of the unit production qualifies as new crude oil. This partial rescission of Ruling 1975-15 was intended to permit but not to require tract-by-tract calculations of upper tier crude oil volumes for tracts subject to unitization agreements to be continued even after the unitization agreement has become effective.

However, it is nevertheless clear that due to the eventual alteration of tract-by-tract producing patterns, production from the unit must at some point be treated as the aggregate of production from all the participating tracts, in order to obtain a meaningful comparison of production levels. Accordingly, in connection with the first stage of EPCA rulemaking proceedings, FEA determined that upon implementation of enhanced recovery techniques, or upon the significant alteration of producing patterns, a producer must treat the unit as a single property, if it has not already been treated as such. If the unit is an enhanced recovery property as defined in § 212.75, a unitized BPCL would be calculated. Regardless whether the unit was formed for enhanced recovery, the new rule required that the unit be treated as the property from such time as there has been a significant alteration in producing patterns.

In this rulemaking, FEA solicited comments on the appropriate manner for determining the point at which there has been a significant alteration in producing patterns. Comments received in response to the April 13 Notice included a variety of suggestions for determining when producing patterns have been significantly altered. These included (1) requiring a unitized BPCL, as of the date of unitization; (2) permitting the use of an op-

tion until injection occurs; (3) permitting the use of an option for two years; and, among others, (4) permitting the use of an option for an indefinite period.

FEA has considered carefully all the suggestions contained in the comments, and has concluded that the use of any fixed date other than the effective date of unitization would be arbitrary. On the other hand, the comments submitted in connection with this rulemaking indicated the difficulty associated with attempting to develop a workable standard for determining the point at which production patterns have been significantly altered.

In response to the various comments received in this regard, FEA is today adopting a modified unitization rule intended to provide a mechanism whereby producers can determine quanities of upper and lower tier crude oil from unitized properties in a way that provides a meaningful comparison of current production and base level production, and to provide a mechanism that does not discourage the increased production of crude oil that might otherwise be obtained through unitization.

Accordingly, the rule adopted today fixes a date certain for each unitized property to be treated as a single property under FEA regulations, but provides sufficient flexibility for extending that date in those cases where the producer can establish that there is no need to depart from tract-by-tract determinations of upper and lower tier crude oil.

The rule provides that as of the effective date of unitization, the producer must (unless certain conditions are met) treat the unit as the property and determine upper tier crude oil by comparing current production and sale from the unit with the accumulated BPCL's of all of the participating properties. The effective date of unitization is appropriate because it is a well-defined date that is established by the state regulatory authority and is the date generally recognized throughout the industry and

by the states for the purposes of accounting and making payments to interest owners. The use of any other date would necessarily entail the establishment of a separate system of reporting and accounting.

FEA recognizes that some producers perceived the use of this date as stated in Ruling 1975-15 as a disincentive to unitization because new crude oil produced from some of the pre-unitized properties that comprise the unit might be required after that date to be sold at old crude oil prices to compensate for other pre-unitized properties that contributed production to the unit that was significantly below their BPCL's or that had cumulative deficiencies. This result was avoided in substantial measure, however, by the elimination of all cumulative deficiencies as of the date that the unit is treated as a single property. However, because a unit BPCL is based upon the average monthly production and sale of old crude oil (with respect to non-stripper well properties) in the 12 month period immediately preceding unitization, to the extent that following unitization some pre-unitized properties were producing less than their average monthly production in the preceding 12 month period, those amounts would have to be compensated for by selling at old crude oil prices that would otherwise be new crude oil production from other pre-unitized properties.

In order to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties, a special rule is adopted today which will ensure that once a unit BPCL has been established there will be no decrease in absolute volumes of new crude oil. Thus, regardless whether the unit BPCL is exceeded by current unit monthly production and sale, amount of production from the unit will always qualify for treatment as new crude oil. This amount, referred to as "imputed new crude oil," is a number of barrels each month equal to the number of barrels of new crude oil produced and sold from each of the participating properties during the 12

month period immediately preceding the establishment of a unitized BPCL. Production and sale of "imputed new crude oil" will have no effect insofar as the "current unit cumulative deficiency" is concerned. Only when production and sale of crude oil from a unit exceeds the unit BPCL will the deficiency provision be operative, and the amount of any such deficiency will be calculated from month to month also without regard to any production and sale of "imputed new crude oil."

FEA will not prescribe the distribution of such volumes of upper tier crude oil among unit participants, but will continue to permit such determinations to be made by the parties concerned. The existing rule with respect to contribution to the unit of volumes of crude oil produced from stripper well properties remains unchanged. The new unitized BPCL rule applies to all unitizations approved by applicable governmental authority, regardless whether for enhanced recovery purposes or not. Accordingly, the former definition of "enhanced recovery project" is deleted from § 212.75. The requirement that a unit BPCL be adopted on the date of unitization contains an exception to provide the maximum flexibility to producers seeking to form and maintain unitized properties. The exception provides that notwithstanding the requirement to adopt a unitized BPCL as of the effective date of unitization, determinations of upper and lower tier crude oil volumes may continue to be made separately for properties that comprise the unit, after certification to FEA of intention to do so and only for so long as (1) injection has not begun, and (2) there has been no transfer of production allowables among participating leases. Such certifications should be made to FEA pursuant to the provisions of 10 CFR Part 210, Subpart G (Other Proceedings). Beginning with the month following the occurrences of either event the producer will be required to treat the unit as a single property.

Finally, some producers erroneously interpreted Ruling 1975-15 to require the accumulation into a unit BPCL of the entire BPCL of each property as to which any portion has been unitized, including amounts of the BPCL attributable to non-unitized portions of participating properties. This is not required, however, as FEA has pointed out above in connection with the definition of property.

The foregoing clarifications and modifications to the regulations concerning unit BPCL's should serve effectively to remove any FEA regulatory impediments to the formation of units, and thereby facilitate the enhanced recovery projects such units are typically intended to promote.

V. MISCELLANEOUS

FEA also solicited comments in any other area of the price regulations applicable to domestic crude oil which might need clarification or amendment. Particularly in this regard, producers were asked to address the extent, if any, to which the certification requirements of 10 CFR 212.131 impose an unnecessary burden on small producers. Some small producers had indicated that this has been the case due to the nature of their relationships with their purchasers, where, for example, the purchaser (rather than the producer) may have access to the information needed to effect a valid certification. Comments were solicited to address the extent of this problem and possible alternative methods of certifying the information currently required under § 212.131.

Specifically, several first purchasers have indicated that the certification requirements of § 212.131(a)(1) are unclear with respect to the alternative one-time certification provision in cases of production from stripper well properties, since the requirement to certify a property's base production control level has no meaning for stripper well properties.

After consideration of the comments submitted in this proceeding, as well as other available information, FEA has determined that it is appropriate to amend § 212.131 (a) applicable to certifications by producers, in order to provide a less complicated procedure for such certifications. Questions concerning certifications by resellers will be considered in a subsequent proceeding.

The previous certification requirements evolved over the past three years from the rule originally adopted by CLC on August 17, 1973, requiring producers which charged a price in excess of the ceiling price to certify in writing to the purchaser in each sale: (1) the ceiling price of the crude oil; (2) the amount of new crude oil; and (3) the base production control level. These certifications were required to contain a statement that the price charged for the crude oil was not greater than the price permitted under Subpart L (6 CFR 150.354, 38 FR 22536 at 22539, August 22, 1973).

These requirements were substantially continued by FEO in 10 CFR 212.74(c) (39 FR 1924, January 15, 1974) and remained unchanged until August 29, 1974 (39 FR 31622, August 30, 1974) when FEA issued amendments to lay the foundation for the implementation of the old crude oil allocation program. At that time the certification requirements were deleted from § 212.74 and appeared in a new § 212.131, which required each producer and each seller of domestic crude oil to certify in writing to the purchaser, with respect to each sale: (1) The ceiling price (in first sales), (2) the amount of stripper well lease crude oil, (3) the amount of new crude oil, (4) the amount of released crude oil, and (5) the amount of old crude oil. These certifications also were required to contain a statement that the price charged was not greater than permitted pursuant to Part 212.

FEA amended the certification requirements to "insure that old domestic crude petroleum [would] be more

easily traced" in connection with the anticipated program to allocate old crude oil (39 FR 31623), and in adopting the old oil allocation program (39 FR 42246, December 4, 1974), FEA further amended § 212.131 to provide that the certification requirements as to a first sale of domestic crude oil may be satisfied by a one-time certification as to the BPCL for each month of 1972 for the particular property. The requirements remained substantially unchanged until February 1, 1976 when FEA adopted the first stage of EPCA implementing regulations (41 FR 4931, February 3, 1976). At that time, basically three changes were made:

(1) The requirement to certify "ceiling price" was expanded to "ceiling price or prices" to account for the upper tier ceiling price rule adopted on February 1, 1976;

(2) The permissive one-time certification provision was amended to make it clear that (a) prior to February 1, 1976, the rule required a certification of the property's BPCL for each month in 1972, and (b) effective February 1, 1976, the rule required a certification of the property's BPCL (either average monthly production and sale of crude oil in 1972, or average monthly production and sale of old crude oil in 1975), and a certification of the upper and lower tier ceiling prices for the particular crude oil; and

(3) Each producer was required in the month of February 1976 to certify in writing to each purchaser for each property whether 1972 or 1975 would be used to determine the property's BPCL.

With respect to the one-time certification procedure permitted under § 212.131, then, prior to February 1, 1976, a producer could comply fully with the requirements of the rule by certifying once in writing to the purchaser (1) the monthly production and sale of crude oil from the property concerned in 1972, and (2) that

the price charged for the crude oil was not in excess of the maximum price permitted under Part 212. The requirement (2) above did not necessitate the use of an actual price, but only a certification that the price charged was not unlawful.

Effective February 1, 1976, however, new written certifications were required by each producer for each purchaser from each property. The certification requirements could be satisfied by a new one-time certification containing (1) the property's BPCL (either average monthly production and sale of crude oil during 1972 or average monthly production and sale of old crude oil during 1975, selected by the producer); (2) the lower and upper tier ceiling prices; and (3) a statement that the price charged is not in excess of that permitted under Part 212. Moreover, in the month of February 1976, each producer was required to certify in writing to each purchaser from each property whether the BPCL would thereafter be based upon average monthly production and sale of crude oil in 1972 or average monthly production and sale of old crude oil in 1975.

Producers have indicated basically two problems with the one-time certification provision of § 212.131, which the amendment adopted today is designed to eliminate. First, with respect to stripper well properties, the one-time certification of the "BPCL" is confusing in that such properties are not required to compute BPCL's. Second, with respect to a non-stripper well property from which crude oil is sold to more than one purchaser, the one-time certification of the property's BPCL does not accomplish the purpose of the certification requirement, in that it does not provide the purchasers with sufficient information to determine how much of that purchaser's crude oil purchased each month is properly classified as new crude oil. Where the property's total monthly production is sold to a single purchaser, of course, that purchaser can easily determine the amount of new crude oil each month

by subtracting the property's BPCL from the current monthly production and sale. Where the property's total monthly production is sold to two or more purchasers, however, none of the purchasers is able to determine the amount of new crude oil without knowing how much production was sold to other purchasers.

Finally, with respect to all properties, the requirement that the one-time certification contain the lower and upper tier ceiling prices is also confusing due to the monthly upward adjustments in the lower and upper tier ceiling prices established under the second stage rulemaking proceeding to implement the crude oil pricing policy of the EPCA (41 FR 15566, April 13, 1976). Although the monthly upward adjustments to crude oil prices established under the second stage have been temporarily discontinued (41 FR 27730, July 6, 1976) they will, of course, resume after the over-recoupment has been corrected, and a one-time certification of those ceiling prices is obviously not possible under a system of continuing adjustments.

The amendment adopted today is designed to resolve any confusion with respect to the problems discussed above, and to eliminate any unnecessary certification burden on producers by requiring (wherever possible) only a one-time certification, containing the minimum amount of information needed to ensure the efficient monitoring of crude oil prices and to maintain the necessary lower and upper tier distinction with respect to a fungible commodity. Accordingly, under the amendments adopted today, a producer of a stripper well property is required only to certify to each purchaser (1) that the property has qualified as a stripper well property, (2) the property's average daily production during the 12 month period in which it qualified as a stripper well property, and (3) the highest posted price on September 30, 1975 which forms the basis for the upper tier ceiling price of the crude oil sold from that property. With respect to

nonstripper well properties from which crude oil is sold only to one purchaser, the producer is required only to certify (1) the property's monthly BPCL (and whether based upon 1972 or 1975) and (2) the highest posted prices on May 15, 1973 and September 30, 1975, which form the bases for the lower and upper tier ceiling prices for crude oil sold from that property. With respect to nonstripper well properties from which crude oil is sold to two or more purchasers, the producer will, in addition to a one-time certification, of posted prices used to determine lower and upper tier ceiling price, be required in each sale to certify (1) the number of barrels of new crude oil, and (2) the number of old crude oil.

For crude oil production from unitized properties for which the producer has determined a unit base production control level, if crude oil is sold only to one purchaser, the producer is required only to certify (1) the monthly unit base production control level, (2) the amounts, if any, of "imputed new crude oil" and "imputed stripper well crude oil," and (3) the highest posted prices on May 15, 1973 and September 30, 1975, which form the bases for the lower and upper tier ceiling prices for crude oil sold from that property. With respect to such unitized properties from which crude oil is sold to two or more purchasers, the producer will, in addition to a one-time certification of posted prices used to determine lower and upper tier ceiling prices, be required in each sale to certify (1) the number of barrels of new crude oil (and whether "actual new crude oil" or "imputed new crude oil"), (2) the number of barrels of "imputed stripper well crude oil," and (3) the number of barrels of old crude oil.

All producers are required by October 1, 1976 to render the one-time certifications in writing to the purchaser. Exceptions will be permitted, of course, for (1) those stripper well properties which qualify after September 1, 1976, in which event the one-time certification will be

required within 60 days after qualification; (2) those properties from which crude oil is first produced and sold after September 1, 1976, in which event the one-time certification will be required within 60 days after crude oil has first been produced and sold; (3) those cases in which new supplier/purchaser relationships are properly established after September 1, 1976, in which event the one-time certification to that purchaser will be required within 60 days after crude oil has first been sold to that purchaser; and (4) those unitized properties for which a unit base production control level is first established after September 1, 1976, in which event the one-time certification will be required within 60 days after a unit BPCL has been established.

Finally, it should be noted that it has been the practice among many purchasers and producers for the purchaser to prepare the certification and send it to the producer for completion and authentication and return to the purchaser. FEA has no objections to this practice to the extent that it permits any large purchaser to help to relieve the certification burdens on a small producer. However, the certification responsibility must in every case rest ultimately with the producer.

Moreover, § 212.131(c) makes it clear that "[n]o firm may sell domestic crude oil unless it provides the certification required by this section." To ensure compliance with the requirements of this section, a purchaser may refuse to recognize a sale of crude oil at other than lower tier prices until the necessary certification has been made. Indeed, the purchase of crude oil at other than lower tier prices, in the absence of a valid certification, clearly constitutes a violation of FEA regulations.

VI. FURTHER COMMENTS REQUESTED

FEA has attempted in this proceeding to undertake a comprehensive analysis of the definition of "property," as well as other technical issues that have arisen with re-

spect to the proper application of the Mandatory Petroleum Price Regulations applicable to first sales of domestic crude oil. Nevertheless, FEA is concerned that there may remain some peripheral issues that justify further consideration. Moreover, the conclusions set forth in this Notice—although the result of FEA's thorough consideration of all the comments and data available to FEA —may engender further comment from those parties that are likely to be affected by those conclusions.

Accordingly, FEA requests further comments addressed to the resolution of the issues addressed in this Notice, or to any other issue not specifically addressed in this Notice, that might need further clarification or modification. In this regard, comments should be restricted to issues concerning the Mandatory Petroleum Price Regulations applicable to first sales of domestic crude oil. Comments should be addressed to Executive Communications, Room 3309, Federal Energy Administration, Box GQ, Washington, D.C. 20461, and should be identified on the outside envelope and on documents submitted to FEA Executive Communications with the designation "Clarifications to the Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil: Further Comments."

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185.)

In consideration of the foregoing, Part 212 of Chapter II of Title 10 Code of Federal Regulations is amended as follows, effective September 1, 1976.

Issued in Washington, D.C., August 20, 1976.

MICHAEL F. BUTLER,
General Counsel,
Federal Energy Administration.

1. Wherever the term "stripper well lease" appears in Part 212, it is changed to read "stripper well property."

2. Section 212.72 is amended to read as follows:

§ 212.72 Definitions.

* * * *

"Property" means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation

* * * *

3. Section 212.75 is revised to read as follows:

§ 212.75 Determination of upper tier crude oil produced from unitized properties.

(a) *Rule.* With respect to each unitized property, a producer shall, as of the effective date of unitization, establish a unit base production control level.

(b) *Definitions.* For purposes of this section:

"Current unit cumulative deficiency" means the total number of barrels by which production and sale of crude oil from the unitized property was less than the unit base production control level subsequent to the first month (following the establishment of a unit base production control level for that unitized property) in which any crude oil produced and sold from that unit was eligible to be classified as actual new crude oil (without regard to whether the amount of actual new crude oil was exceeded by the amount of imputed new crude oil), minus the total number of barrels of domestic crude oil produced and sold in each prior month from that unitized

property (following the establishment of a unit base production control level for that unitized property) which was in excess of the unit base production control level for that month, but which was not eligible to be classified as actual new crude oil because of this requirement to reduce the amount of actual new crude oil in each month by the amount of the current unit cumulative deficiency.

"New crude oil" means either (a) actual new crude oil, which is the total number of barrels of crude oil produced and sold in a specific month from all properties that constitute the unitized property, less (1) the unit base production control level, and less (2) the current unit cumulative deficiency; or (b) imputed new crude oil, which is a number of barrels of crude oil equal to the total number of barrels of new crude oil produced and sold during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property, from all properties that constitute the unitized property, divided by 12; whichever number is greater.

"Old crude oil" means the total number of barrels of crude oil produced and sold in a specific month from all properties that constitute the unitized property, less the total number of barrels of new crude oil produced and sold from the unitized property in that month, and less the total number of barrels of crude oil sold at the upper tier ceiling price pursuant to the provisions of paragraph (f) of this section.

"Significant alteration in producing patterns" means the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property.

"Unit base production control level" means, (1) the total number of barrels of old crude oil, as defined in

§ 212.72, produced and sold during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property from all properties that constitute the unitized property; plus (2) the total number of barrels of crude oil produced during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property from all stripper well properties that constitute the unitized property; divided by 365, and multiplied by the number of days in the particular month.

"Unitized property" means the right to produce crude oil that arises from a unitization agreement approved by the applicable governmental regulatory authority (or FEA).

(c) Notwithstanding the provisions of paragraph (a) above, a producer shall not be required to establish a unit base production control level for a particular unitized property, provided that the producer has (pursuant to the provisions of 10 CFR Part 205, Subpart G) certified to FEA its intention to continue to determine volumes of upper and lower tier crude oil separately for all properties that constitute the unitized property, and provided further that the unitized property has not sustained a significant alteration in producing patterns.

(d) Except as provided in paragraphs (e) and (f) below with respect to new crude oil and imputed stripper well property crude oil, no producer of crude oil from a unitized property may charge a price higher than the lower tier ceiling price (as set forth in § 212.73 of this Part) for any first sale of domestic crude oil produced and sold from the unitized property.

(e) Notwithstanding the provisions of paragraph (d) above, a producer of crude oil from a unitized property may, in any month, charge a price not to exceed the upper tier ceiling price (as set forth in § 212.74) in first

sales of new crude oil produced and sold from the unitized property.

(f) Notwithstanding the provisions of paragraphs (d) and (e) above, a producer of crude oil from a unitized property may, in any month, charge a price not to exceed the upper tier ceiling price (as set forth in § 212.74) in first sales of imputed stripper well crude oil, which is a number of barrels of crude oil equal to the total number of barrels of crude oil produced during the 12 month period immediately preceding the establishment of a unit base production control level for the unitized property, from all stripper well properties that constitute the unitized property, divided by 12.

4. Section 212.131 is revised to read as follows:

§ 212.131 Certification of domestic crude oil sales.

(a) (1) *Stripper well properties.* With respect to each stripper well property, the producer shall certify in writing to each purchaser of crude oil produced from that property:

(i) That the property concerned has qualified as a stripper well property;

(ii) The average daily production for the 12 month period during which the property qualified as a stripper well property; and

(iii) The highest posted price on September 30, 1975, for transactions in that particular grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

The certification required under paragraph (a) (1) of this section shall be made (i) on or before October 1,

1976, with respect to any property which qualified as a stripper well property on or before August 1, 1976; and (ii) with respect to any property which qualifies as a stripper well property after August 1, 1976, within 60 days from the date that such property qualifies as a stripper well property.

(2) *Non-stripper well properties.* (i) With respect to each sale of crude oil from a property which has not qualified as a stripper well property, the producer shall certify in writing to the purchaser the number of barrels of new crude oil and the number of barrels of old crude oil. With respect to any property which has not qualified as a stripper well property, and from which crude oil is only sold to one purchaser, the requirements of this paragraph (a)(2)(A) may be complied with by a one-time certification to the purchaser of the property's monthly base production control level determined pursuant to 10 CFR 212.72, and whether based upon production and sale of crude oil in 1972 or upon production and sale of old crude oil in 1975.

(ii) With respect to each property which has not qualified as a stripper well property, the producer shall certify in writing once to each purchaser of crude oil produced and sold from that property:

(A) the highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; and

(B) the highest posted price on September 30, 1975 for transactions in that particular grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil

which is most similar in kind and quality in the nearest field for which prices were posted.

(iii) The one-time certification required under paragraph (a)(2)(ii) of this section, and the one-time certification permitted under paragraph (a)(2)(i) of this section, shall be made on or before October 1, 1975, provided that with respect to any property from which crude oil has not been produced and sold prior to August 1, 1976, the one-time certification required under paragraph (a)(2)(ii) of this section, and the one-time certification permitted under paragraph (a)(2)(A) of this section, shall be made within 60 days from the date when such crude oil is first produced and sold.

(3) *Unitized properties.* (i) With respect to each sale of crude oil from a unitized property for which the producer has determined a unit base production control level, the producer shall certify in writing to the purchaser the number of barrels of new crude oil (and whether "actual new crude oil" or "imputed new crude oil" determined pursuant to 10 CFR 212.75(b)), the number of barrels of old crude oil, and the number of barrels of imputed stripper well crude oil (if any) determined pursuant to 10 CFR 212.75(b). With respect to any unitized property for which the producer has determined a unit base production control level, and from which crude oil is only sold to one purchaser, the requirements of this paragraph (a)(3)(i) may be complied with by a one-time written certification to the purchaser of (A) the monthly unit base production control level determined pursuant to 10 CFR 212.75(b); (B) the amount of imputed new crude oil (if any, determined pursuant to 10 CFR 212.75(b)); and (C) the amount of imputed stripper well crude oil (if any, determined pursuant to 10 CFR 212.75(b)).

(ii) With respect to each unitized property for which the producer has determined a unit base production con-

trol level, the producer shall certify in writing once to each purchaser of crude oil produced from the property:

(A) the highest posted price at 6 a.m., local time May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; and

(B) the highest posted price on September 30, 1975, for transactions in that particular grade crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

(iii) The one-time certification required under paragraph (a) (3) (ii) of this section, and the one-time certification permitted under paragraph (a) (3) (i) of this section, shall be made on or before October 1, 1975, provided that with respect to any unitized property for which a unit base production control level has not been established prior to August 1, 1976, the one-time certification required under paragraph (a) (3) (ii) of this section, and the one-time certification permitted under paragraph (a) (3) (A) of this section, shall be made within 60 days from the date when such unit base production control level is established.

(4) *New purchasers.* With respect to any purchaser who has not purchased crude oil from the property (or the unitized property) concerned prior to August 1, 1976, the one-time certifications required under paragraphs (a) (2) (ii) and (a) (3) (ii) of this section, and the certifications permitted under paragraph (a) (2) (i) and (a) (3) (i) of this section, shall be made within 60 days from the date such purchaser first purchases crude oil from that property or unitized property.

(b) (1) Each seller of domestic crude oil, other than a producer of domestic crude oil covered by paragraph (a) (1) of this section shall, with respect to each sale of domestic crude oil other than (i) an allocation sale pursuant to § 211.65 of Part 211, or (ii) a sale in which no volumes of old crude oil are deemed to have been transferred pursuant to § 211.67(g) of Part 211, certify in writing to the purchaser the amount of old crude oil included in the volume of domestic crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part.

(2) Each seller of domestic crude oil, other than a producer of domestic crude oil, shall make the certification required by this paragraph as soon as practicable after receipt of the required certifications from its sellers, but in no event later than 30 days following such receipt. However, if the domestic crude oil is not sold until after the expiration of the thirty-day period, the certification required by this paragraph shall be made within ten days following the sale of the domestic crude oil.

(c) With respect to each allocation sale under § 211.65 of Part 211, the seller shall certify in writing to the purchaser the amount of old crude oil deemed (under the provisions of § 211.67(f) of Part 211) to be included in the volume of crude oil so sold. Such written certification shall be made within 25 days following the month in which the crude oil so sold is delivered to or for the account of the purchaser.

(d) No firm may sell domestic crude oil unless it provides the certification required by this section. No firm may knowingly purchase domestic crude oil for which there is no certification as required by this section; provided, however, that the provisions of this paragraph do not apply to the sale of domestic crude oil to a firm under circumstances of economic or other coercion in which the

buyer, because of its need for crude oil, had no reasonable alternative but to purchase the domestic crude oil for which there is no certification, and such firm promptly reports the purchase to the Federal Energy Administration for investigation.

(e) All certifications required by this section shall be in writing, either upon an invoice or billing or by separate instrument, and shall be effective only when delivered to and received by the purchaser of domestic crude oil.

[FR Doc.76-24924 Filed 8-20-76;4:06 pm]

APPENDIX H

LIST OF ALL PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF TEXACO INC. REQUIRED BY RULE 28.1

Subsidiaries

Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigeria) Limited
Quimica Industrial "FIDES" S.A.
Texaco Canada Inc.
Public Fuel Transmission Systems Limited
Great Eastern Oil & Import Co. Limited, The
Texaco Norway A/S
Deutsche Texaco Aktiengesellschaft
Texaco Portugal Prospeccao e Producao, S.A.R.L.
Texaco Exploration Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.
Texaco Nigeria Limited
Texaco-Cities Service Pipe Line Company
Tadlaqaz S.A.
American Overseas Petroleum Limited
Bunkerservice Brunsbuttel Gmbh
Societe Iviorienne De Futs et D'Emballages (SIFEMBAL)
Societe Guineenn De Lubrifiants et D'Emballages (SOQUILUBE)
Caltex Petroleum Corporation
Australian Lubricating Oil Refinery Limited
Phoenicia Oil Company S.A.L.
Sydney Metropolitan Pipeline Pty. Limited
Koa Oil Company, Limited
Mediterranean Refining Company
Nippon Petroleum Refining Company, Ltd.
Tokyo Tanker Company, Limited

Caltex Deutschland Gmbh
Caltex Mediterranean Limited
Condea Chemie Gmbh
Federated Pipe Lines Ltd.
Flexibox Gmbh
LPG de Panama, S.A.
Pembroke Capital Company Inc.
P. T. Caltex Pacific Indonesia
Petrogas, S.A.
Texaco Maroc
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Bonafides Grundstueksverwaltunggesellschaft Gmbh & Co. Vermietungs KG
Bayswater Nominees Pty. Ltd.
Hunter Pipeline
Majik Markets
Caltex Australia Limited
Ful-Tex Euro Services Inc.
West Australian Petroleum Pty. Limited
Honam Oil Refinery Company, Limited
Korea Tanker Company Limited
Societe Ivoirienne D'Entrepasage De Produits Petroliers (S.I.E.P.P.)
Texaco Ghana Limited
Mamafil Limited

Affiliates

Badger Pipe Line Company
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Coloniel Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company

Laurel Pipe Line Company
LOCAP Inc.
LOOP Inc.
Olympic Pipe LIne Company
Portland Pipe Line Corporation
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Aircraft Fuel Supply B.V.
Airport Refueling Services, S.p.A.
Aktiebolaget Svensk Petroleumlagring
Alberta Products Pipe Line Ltd.
Arabian American Oil Company
Associated Octel Company Limited, The
Aviation Fuel Services Ltd.
Boral Limited
New Zealand Refining Company Limited, The
South Africa Oil Refinery (Proprietary) Ltd.
Batangas Land Company Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
East African Oil Refineries Limited
H.C. Sleigh Limited
Pakistan Refinery Limited
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage (S.R.E.)
Cia. Refinadora Petrolera Santo Domingo Inc.
Deutsche Transalpine Olleitung Gmbh
Forenade Svenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiano S.A.
Ghana Bunkering Services Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Maghreb Gaz S.A.
Mainline Pipelines Limited
Milan Airport Refueling Services, S.p.A. (MARS)

Mitsui-Texaco Chemical Co., Ltd.
Montreal Pipe Line Company Limited
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberheinische Mineralolwerke G.m.b.h.
Pars Investment Corporation
Pipelines of Puerto Rico, Inc., The
Raffinerie de Sud-Ouest S.A.
Rheem del Ecuador C.A.
Rhien-Mein Rohrleitungstransportgesellschaft mbh
Saudi International Petroleum Carrier Ltd.
Sierra Leone Petroleum Refining Company Limited, The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Axioni Raffinerai Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe D'Entreposage de Bobo-Dioulasso (SEB)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe De Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)
Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
Svensk Petroleum Forvaltning Aktiebolag
Tankanlage AG Ruemlang (TAR)
Texaco Mexicana, S.A. de C.V.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich Gmbh
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited

Trinmar Limited
Trintovac Developments Limited
United Kingdom Oil Pipelines Limited
Unterflur-Betankungaalage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services das Entreprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardaberg
Association Petroliere Belge
Aviation Fueling Services, S.A.
Aviation Service Center
Compagnie d' Entreposage Communautaire
Singapore Refining Company Private Limited
Societe Belge de Transport Par Pipeline S.A.
Svensk Petroleumadministration AB
Total Centrafricaine de Gestion
Societe Agricole des Entreprises Petrolieres
Union des Raffineurs Belges
Svensk Petroleumlagring Tre Aktienbolag
Societe Camerounaise des Depots Petroleirs (SCDP)
Trans-Northern Pipelines Inc./Pipelines Trans-Nord Inc.
Bergemann KG
Drapol International Limited
Bahrain National Gas Company (B.S.C.)
Farmer Construction Limited
Nippon Oil Staging Terminal Company, Limited
Newcastle Pipeline
Motorway Services Ltd.
Mdina Weave Ltd.

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No. 82-1076

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals correctly upheld the Department of Energy's interpretation of its own regulation defining the term "property" for purposes of the federal crude oil price control regulations, under which multiple reservoir-wide crude oil production units established by the Louisiana Office of Conservation within the confines of a single fee or leased premises were not automatically entitled to treatment as separate "properties."

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DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 690 F.2d 180. The opinions of the district court denying respondents' motions to dismiss the complaints (Pet. App. 23a-44a) and granting summary judgment for petitioners (Pet. App. 45a-50a) are reported at 507 F. Supp. 1365 and 519 F. Supp. 351.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on October 4, 1982. A petition for rehearing was denied on November 26, 1982 (Pet.

App. 22a). The petition for a writ of certiorari was filed on December 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATEMENT

1. *The Regulatory Background*

a. Under the authority of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, the Cost of Living Council ("CLC"), on August 17, 1973, issued its Phase IV system of price controls for domestic crude oil production (6 C.F.R. Part 150 subpart L (1974); 38 Fed. Reg. 22538). The Phase IV controls were structured as a two-tier pricing system (6 C.F.R. 150.354 (1974)), which was designed to accomplish the dual objectives of halting the inflationary spiral in crude oil prices while attempting to limit the extent to which price controls would cause disincentives to possible future increases in domestic production.

Central to the two-tier system was the concept of "property." Generally, if in a given month an operator produced and sold *from a property* no more than the amount of crude oil that it produced and sold in the same month in 1972, the price for such production could not exceed the controlled price for "old oil." Any production from the property in excess of the 1972 base period production level was deemed "new oil" and could be sold at prices above the controlled price.

As originally promulgated by the CLC, "property" was defined as

> [t]he right which arises from a lease or from a fee interest to produce domestic crude petroleum.

38 Fed. Reg. 22538 (1973). Thus, in order to determine what constituted a particular property for the purpose of calculating lawful prices, the definition required that the producer focus on the "right * * * to produce" crude oil "which arises from a lease or from a fee interest." See *Grigsby* v. *DOE*, 585 F.2d 1069, modified on reh'g 585 F.2d 1080, 1083 (Temp. Emer. Ct. App. 1978), cert. denied, 440 U.S. 908 (1979).

b. Because of the possibility that changes in ownership and a restructuring of the right to produce crude oil might have occurred since the promulgation of the property definition in 1973, the Department of Energy ("DOE"),[1] on August 29, 1975, issued Interpretative Ruling 1975-15. 40 Fed. Reg. 40832. The Ruling discussed a number of different issues concerning the property definition, including the treatment of multiple reservoirs within a single property. It stated (*id.* at 40833):

> Because the property concept is based upon the right to produce crude oil, whether arising from a lease or from a fee interest, the existence of two or more separate and distinct reservoirs will not in itself create two or more separate "properties." Therefore * * * where a producer holds a single right to produce crude oil from two or more reservoirs, together the two or more reservoirs constitute a single property; where there are separarate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property.

Under this approach, an accident of geology, such as the presence of more than one reservoir under a sin-

[1] As used herein, "DOE" includes the Department of Energy, the Secretary of Energy, and predecessor agencies of the DOE, including the Federal Energy Administration.

gle property, did not affect the operator's right to produce and therefore could not provide, by itself, a basis for separate property treatment.

The Ruling also addressed the role of state law in interpreting federal regulations, and pointed out that, while

> various state and other federal regulatory authorities may, for other purposes, have monitored production levels on other bases (*e.g.*, by physical boundaries or by producing formations or reservoirs), it is necessary that the price regulations embody a uniform concept, the parameters of which can be readily applied to all domestic production, regardless of varying state classifications. For this reason, FEA regulations utilized, as a reference, a property concept, based upon the right to produce crude oil, that can be readily identified for all producers.

40 Fed. Reg. at 40832.

c. On December 22, 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 *et seq.* By this time, the condition of the nation's oil supplies had changed drastically as a result of the Middle East oil embargo and resulting shortages. In response to this situation, EPCA required the establishment of a new crude oil pricing policy. Specifically, Section 401 of EPCA, 89 Stat. 941, changed the regulatory focus that had existed under the ESA and mandated the promulgation of new regulations designed to obtain the optimum production of crude oil in the United States.

On August 20, 1976, after notice and comment and as part of the rulemaking implementing EPCA, the Federal Energy Administration ("FEA") issued a final rule amending the property definition by adding to the basic "right to produce" concept of the original

rule the alternative option, effective after September 1, 1976, of treating as separate "properties" separate reservoirs recognized as distinct producing units by the appropriate governmental regulatory body. 41 Fed. Reg. 36172 (1976). The FEA explained that, given the new priorities and mandate of EPCA, the incentives under the two-tier system would now arguably be maximized under the new reservoir-by-reservoir approach. *Id.* at 36178.[2]

2. ***The Proceedings Below***

a. On May 1, 1979, DOE, acting pursuant to 10 C.F.R. 205.193 (1978), issued a Proposed Remedial Order ("PRO") with respect to petitioner Texaco Inc. ("Texaco"). The PRO alleged that during the period from September 1973 through March 1979, Texaco sold crude oil it produced in Louisiana, Texas, New Mexico, Wyoming and the Outer Continental Shelf at prices in excess of the maximum lawful prices. Texaco's violations, the PRO alleged, were the result of numerous unlawful pricing practices, including the treatment of reservoir-wide Louisiana Office of Conservation ("LOC") units as separate properties under the 1973 property regulation. The PRO alleged that Texaco had overcharged purchasers of crude oil by $748 million, and sought refunds of that amount plus interest.

Texaco, as well as petitioners Louisiana and the Louisiana Land and Exploration Company ("LL&E"), filed Notices of Objection to the PRO and adjudicatory proceedings then commenced before the DOE's Office

[2] The preamble to the August 20 rulemaking was reissued as Ruling 1977-1. 42 Fed. Reg. 3628 (1977). Subsequently, FEA issued Ruling 1977-2 (42 Fed. Reg. 4409 (1977)), which reaffirmed Ruling 1977-1 and added a few clarifications not relevant here.

of Hearings and Appeals ("OHA"). See 10 C.F.R. 205.193 (1978). The OHA proceeding is still pending.

b. In May 1980, the State of Louisiana brought this action for declaratory and injunctive relief in the United States District Court for the Western District of Louisiana, challenging DOE's interpretation of the definition of property in the 1973 regulation.[3] Texaco and LL&E intervened as of right.

On July 7, 1981, the district court granted summary judgment for petitioners (Pet. App. 45a-50a). In its decision, the district court (*id.* at 46a) incorporated the findings and conclusions set forth in its earlier decision denying DOE's motions to dismiss the complaints (*id.* at 23a-44a). The court found (*id.* at 43a, 49a) that a statement in the preamble to the 1976 amendment to the property regulation, which declared that the amendment was intended to allow separate reservoirs to be treated prospectively as separate properties, while previously this was possible only if each of the separate reservoirs was also subject to a separate "right to produce," was a new interpretation of the original 1973 regulation.[4] The district court found that this interpretation, although "rea-

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[3] In July 1979, two months after issuance of the Texaco PRO, Texaco filed suit against the DOE in the United States District Court for the District of Delaware, asserting virtually the same claims as were later presented to and decided by the district court in this case. Louisiana and LL&E were granted leave to intervene in Texaco's action. The Delaware court subsequently dismissed the suits as to Texaco and LL&E. See *Texaco Inc.* v. *DOE*, 490 F. Supp. 874 (D. Del. 1980). Louisiana then voluntarily dismissed its action in Delaware and refiled in Louisiana.

[4] In fact, the agency, in Ruling 1975-15, had stated earlier that separate reservoirs did not automatically qualify as separate properties. 40 Fed. Reg. 40832 (1975).

sonable," was not "compelled," and it concluded that because petitioners offered an "equally reasonable" interpretation of the original property regulation, petitioners' interpretation should prevail (*id.* at 48a-49a). Accordingly, the court refused to defer to the agency's interpretation of its own regulation and instead upheld petitioners' interpretation that all reservoir-wide LOC units within a single lease or fee were *per se* separate properties under the 1973 regulation (*id.* at 49a). The court thereupon enjoined DOE from proceeding administratively against petitioners on the basis of an interpretation of the property definition that conflicts with petitioners' interpretation (*ibid.*).

c. The Temporary Emergency Court of Appeals ("TECA") reversed the district court's grant of summary judgment for petitioners (Pet. App. 1a-20a). After a thorough review of the language and purpose of the "property" definition and the agency's interpretations of that definition, the court of appeals held that DOE's interpretation of its own regulation was reasonable and consistent with the two-tier pricing system under the ESA (*id.* at 14a-17a). The court concluded (*id.* at 20a) that

> [petitioners] knew that they were using a different interpretation in determining whether the oil being produced was old or new. They never sought an agency interpretation to sustain their position. Rather, they seem to have proceeded on the theory that their interpretation was reasonable and that it would afford them protection against such a claim as now being made by DOE. This, of course, is no defense. The history of the regulations, rulings and interpretations demonstrates that there was no justification for their position.

ARGUMENT

The court of appeals correctly affirmed the DOE's reasonable and consistent interpretation of the 1973 "property" regulation to the effect that state recognized separate reservoirs do not, in themselves, constitute separate properties unless a specific reservoir corresponds with a single "right to produce." The question presented is unlikely to recur because crude oil prices were decontrolled more than two years ago.[5] Contrary to petitioners' contention, TECA correctly

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[5] Petitioners argue (Pet. 17) that this case has significance for the future because the effect of the windfall profit tax depends in part on the meaning of the definition of "property" under the June 1979 energy regulations. 26 U.S.C. (Supp. V) 4991. The narrow issue presented here, however, does not focus on the meaning of the June 1979 energy regulations. Rather, the issue is whether, prior to the August 1976 amendment to the property regulation, each reservoir-wide LOC unit within a lease was entitled to be treated as a separate property *per se*.

Moreover, the Secretary of the Treasury has full authority to reinterpret or change the application of DOE regulations for tax administration purposes:

> The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter, including such changes in the application of the energy regulations for purposes of this chapter as may be necessary or appropriate to carry out such purposes.

26 U.S.C. (Supp. V) 4997(b). With regard to the property definition, the Internal Revenue Service has not yet issued its final regulations on the treatment of separate reservoirs within a lease. 47 Fed. Reg. 50858 (1982). Indeed, the IRS has invited comments on "whether [Rulings 1977-1 and 1977-2] should be modified for purposes of the windfall profit tax." 47 Fed. Reg. at 50924. Accordingly, any impact this decision may have for tax purposes is entirely speculative.

concluded that its decision in this case is consistent with its other decisions concerning the proper interpretation of the 1973 "property" regulation in other contexts. This conclusion is entitled to be accorded considerable weight, since, as this Court has recently recognized, Congress established the TECA specifically to ensure expert and uniform treatment of issues such as the one decided here. See *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982).

In addition, petitioners are incorrect in suggesting (Pet. 16) that this case will result in the assessment of billions of dollars for alleged regulatory violations in other cases. Only a limited number of those actions involve allegations of overpricing as the result of treating reservoir-wide LOC units within a single lease as separate properties. Indeed, even as to the pending enforcement action against petitioner Texaco, only a portion of the total alleged overcharge results from Texaco's incorrect property treatment of reservoir-wide LOC units.[6] Hence, further review by this Court is not warranted.

1. Petitioners contend (Pet. 18-22) that the decision below is inconsistent with the TECA's decisions in *Grigsby* v. *DOE*, *supra*, and *Pennzoil Co.* v. *DOE*, 680 F.2d 156 (1982), and that the court "made no effort to reconcile its decision" here with those earlier decisions (Pet. 22). In fact, however, the TECA discussed the *Grigsby* and *Pennzoil* deci-

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[6] Furthermore, although DOE has not sought review of the court of appeals' rulings as to exhaustion of administrative remedies and the ripeness of petitioners' claims (see Pet. App. 8a-11a), it is noteworthy that the administrative proceeding against Texaco is still in the initial stages and there is no certainty that Texaco will be found liable in that proceeding.

sions at length (Pet. App. 17a-18a) and specifically found "no inconsistency in our determination in this case with the holding in *Grigsby* or *Pennzoil* * * *" (*id.* at 18a). Neither *Grigsby* nor *Pennzoil* addressed the issue presented here, *viz.*, whether multiple reservoir-wide LOC units within a single lease qualify as separate "properties" *per se* under the 1973 "property" definition. Rather, as the decision below specifically states (Pet. App. 17a), *Grigsby* and *Pennzoil* "addressed an entirely different question," *viz.*, whether aggregation of several leases into a single production unit ("unitization") constitutes a single "property."

In *Grigsby*, as here, the TECA noted that under the regulation at issue a "property" was "generally synonymous with the tract or premises as to which a right to produce exists pursuant to an oil or gas lease." 585 F.2d at 1083 n.k. The TECA recognized, however, that the agency had never stated that "property" was always defined by the lease. *Ibid.*[7] The

[7] Petitioners suggest (Pet. 19-21) that the TECA deviated in this case from its past "property" decisions in that it changed the focus of the property definition from the "right to produce" to the lease or fee interest. To the contrary, the TECA merely reconfirmed its statements in *Grigsby*, approving the agency's interpretation in Ruling 1977-1, that in most cases the "right to produce" proves to be synonymous with the lease or fee interest, and the premises described in the lease or fee instrument thus describe the property "in the vast majority of instances" (Pet. App. 15a). The court in this case applied this analysis in upholding the agency's position that, "[s]ince the 'right to produce' was the proper basis for making property designations, geological considerations such as reservoir boundaries were irrelevant" (*id.* at 5a). The decision below thus continues, and does not depart from, the TECA's past decisions focusing on the "right to produce" in interpreting the original property regulation.

court found that where mineral fees or leasehold interests were aggregated through unitization, it was the unitized premises that defined the property. Because each of the two LOC unit orders at issue in *Grigsby* aggregated several leasehold premises into a single drilling unit and allocated production from each unitized premises to the various interests comprising the unit on a surface acreage basis, the TECA found that each of the unit orders created a separate right to produce. The court's conclusion in *Grigsby* was not based on the mere existence of a LOC unit order, as petitioners suggest, but rather on an analysis of the specific terms of the particular LOC unit orders aggregating several "rights to produce" into a single entity.[8] Thus, there is no inconsistency between the *Grigsby* holding that a state order aggregating several "rights to produce" establishes a single "right to produce," and the holding below that a state order recognizing the geological fact of separate reservoirs within a single "right to produce" does not as a matter of law establish several new "rights to produce."[9]

Pennzoil, like *Grigsby*, focused solely on the treatment of units created by the aggregation of several leases. In that case, the TECA upheld that portion of Ruling 1975-15 which provided that if several individual leases were aggregated through a unitization, the resulting unit defined the "right to produce,"

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[8] The Louisiana Office of Conservation issues unit orders for many types of units, including various types of reservoir-wide and non-reservoir-wide units, which may be formed voluntarily by producers or compelled by the State.

[9] The TECA's recent decision in *Grigsby* v. *DOE*, No. 5-81 (Jan. 18, 1983), cited by petitioners in their supplemental brief, merely reaffirms its prior decision and thus is no more helpful to petitioners' position than the court's initial decision in *Grigsby*.

and the property consisted of the unitized premises. The court indicated that it was not addressing the application of the property regulation in other contexts (680 F.2d at 168-169), and expressly reserved the issue presented here (which was addressed in a different portion of Ruling 1975-15) concerning the appropriate treatment of reservoir-wide production units within a single lease. 680 F.2d at 178-179 n.42.

In sum, rather than reflecting conflicting interpretations of the property definition, as petitioners maintain, the TECA's decisions in *Grigsby*, *Pennzoil* and this case merely confirm the differences, recognized by the DOE in Ruling 1975-15, between the aggregation of leases to form a unit and segregation of a portion of a single lease.

2. Petitioners contend (Pet. 23) that the TECA denied them "their right to meaningful judicial review" because it "deferred, without analysis," to the agency's interpretation of the property regulation "on the sole ground that it found that position to be 'reasonable.'" Petitioners insist that the court neglected to consider such factors as the consistency of the interpretation with prior agency interpretations and the district court's finding that the treatment of reservoir-wide LOC units as "properties" was consistent with the objectives of price controls.

This contention mischaracterizes not only the proper standard of review for an agency's interpretation of its own regulation but also the TECA's actual analysis in this case. As this Court has repeatedly emphasized, in order to sustain an agency's interpretation of a statute the agency is charged with administering, the reviewing court "need not find that [the agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance

in a judicial proceeding." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153 (1946). See, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). Where, as here, "the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman*, *supra*, 380 U.S. at 16. See, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).[10] Thus, an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall* v. *Tallman*, *supra*, 380 U.S. at 16-17, quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945).

That is precisely the test applied by the TECA in this case (see Pet. App. 14a-17a). After examining the purpose of the two-tier pricing system and the language of the regulation, the court found the agency's interpretation to be reasonable and consistent with the pricing system's underlying policies (*id.* at 16a-17a). The court recognized that in establishing the price control program for crude oil in 1973, the DOE was required "to 'strike a balance' between the policy of restraining price increases and that of stimulating increased domestic production of crude oil" (*id.* at 14a). The agency's interpretation of the 1973

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[10] Petitioners completely ignore this special deference accorded an agency's interpretation of its own regulation. The cases they cite focus not on an agency's interpretation of its own regulation, but on its interpretation of a statute. See, *e.g.*, *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) (rulings interpreting the Fair Labor Standards Act); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (guidelines interpreting Title VII of the Civil Rights Act of 1964).

property regulation sought "to reconcile these 'sometimes conflicting needs' " (*id.* at 15a). In light of this background, the TECA found that an interpretation of the regulation focusing on the "right to produce," and not on state recognition of geological facts such as reservoir boundaries, was one rational means of striking the balance (*ibid.*).

In contrast, the 1976 property regulation was promulgated pursuant to EPCA, which "mandated revisions in the price control program to optimize domestic production" (Pet. App. 16a). Responding to this new mandate, the agency amended the property definition prospectively to provide the option of treating state recognized separate reservoirs as separate properties. Generally, depending on individual production patterns, treating each state recognized reservoir within a single lease or fee as a separate property would increase the proportion of new oil that the lease produces. In turn, new oil sold at higher prices would provide the needed incentive for increased production. As the court of appeals stated (*ibid.*):

> FEA explicitly found that the amendment to the property definition would offer the industry greater incentive to increase exploration and production and thus determined that the amendment would further the policy enunciated by Congress.

Thus, the 1973 property regulation and the 1976 regulation were promulgated pursuant to different statutory mandates and the court below found reasonable the agency's choice of options in responding to the varying policies of Congress.

The TECA correctly ignored the district court's finding that petitioners' interpretation also was reasonable. As this Court has consistently recognized, the alleged reasonableness of a contrary interpreta-

tion makes no difference. See *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303-304 (1977).[11]

Contrary to petitioners' assertion (Pet. 24), the TECA specifically found the agency's position to be consistent. The TECA recognized (Pet. App. 18a-19a) that Ruling 1975-15 specifically addressed the issue presented here—state recognition of multiple reservoirs within a single lease or fee, and the court noted (*id.* at 15a) that both the Notice of Rulemaking issued August 20, 1976, and Ruling 1977-1 reiterated the position expressed by DOE in Ruling 1975-15 that separate reservoirs would not be considered as separate properties *per se*. The court concluded (Pet. App. 15a-16a; citations omitted):[12]

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[11] The cases cited by petitioners do not suggest the contrary. Indeed, in *Pennzoil* v. *DOE*, *supra*, 680 F.2d at 174, the TECA observed that

> to deny deference in accepting the agency's interpretation simply because another interpretation, strained or not, was indulged in by an operator out of self interest, would substitute for the rule of deference to an agency action a rule of deference to that of a producer.

The only support petitioners offer for a less deferential standard of review (Pet. 25-26) is a proposed amendment to the Administrative Procedure Act, 5 U.S.C. 706(c), which would change the existing standard. This legislative proposal, however, has not yet been enacted into law.

[12] The only evidence offered by petitioners to show administrative confusion (Pet. 6, 15) is an ambiguous statement by then FEA Deputy Administrator John Hill to Congress as to the supposed vagueness of the property regulations. Petitioners' reliance on this statement is misplaced. Because the property regulation is applied to many types of premises, including those containing only one reservoir, the precise context to which Mr. Hill's statement was meant to refer is unclear. However, since the agency previously had fully ex-

> The agency has been consistent in this interpretation even though during 1976 it indicated the possibility that it might change its mind and adopt the definition contended for by [petitioners]. * * * After considering the comments received and giving the matter further thought, the agency rejected the proposals. * * * The amended regulations were adopted effective September 1, 1976. They continued the prior definition of property up to September 1976 but changed the definition for the future. This was not an admission that the original definition and its interpretation were wrong or vague. It merely signified the determination of the agency that in the

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plained its position, in Ruling 1975-15, with regard to the treatment under the original regulation of two or more reservoirs subject to the same right to produce, it is unlikely that separate reservoir treatment was the focus of his statement. In any event, unexplained statements to Congress by agency officials are not entitled to be accorded authoritative weight by the courts. See, *e.g.*, *United States* v. *Stewart*, 311 U.S. 60, 70 n.22 (1940).

Petitioners also assert (Pet. 23) that the recognition of separate reservoirs "by the official act of a sovereign state" somehow gives petitioners' reservoirs a special status vis-a-vis the federal property regulation and that the TECA should have considered this fact. The TECA recognized that the state status of these reservoirs was merely an option that the DOE "might * * * have chosen" (Pet. App. 15a) for purposes of the federal regulatory program. State law and regulations are relevant and have applicability with respect to federal regulations only when the federal agency has affirmatively chosen to have such state law or regulations apply. See *Rice* v. *Board of Trade*, 331 U.S. 247, 253 (1947); *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767, 773 (1947). Here, the federal agency decided not to rely on the state classifications but rather to adopt a uniform federal rule.

future the LOC unit designation would better achieve the goal of the pricing system to find new oil.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
DONALD P. HODEL, Secretary of Energy,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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March 21, 1983

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REPLY BRIEF FOR PETITIONERS[1]

ARGUMENT

1. Respondents misstate the position of petitioners, as well as the holding of the court below, with the curious result that they claim as the governing proposition of law precisely the principle urged by petitioners: that separate reservoirs constitute separate "properties" when they correspond to separate "rights to produce." *See* Resp. Br. at 8.

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[1] All parent companies, non-wholly-owned subsidiaries and affiliates of petitioner Texaco Inc. are listed in Appendix H to the Petition for a Writ of Certiorari. Those of The Louisiana Land And Exploration Company are listed on p. ii note of the Petition.

Respondents mistakenly ascribe to petitioners the position that "property" is created by the mere "state recognition of geological facts such as reservoir boundaries, ..." Resp. Br. at 14. They then suggest that the court below rejected that interpretation of the "property" definition in favor of "an interpretation of the regulation focusing on the 'right to produce,' . . . ." *Id.*

In fact, petitioners' position throughout the relevant period and throughout this action has been that each reservoir-wide Louisiana Office of Conservation ("LOC") unit is a "property" because it is a "right to produce." The Temporary Emergency Court of Appeals ("TECA") rejected this claim below, not because it "focus[ed] on the 'right to produce,'" but because it ignored that concept and instead upheld DOE's "general position that the lease defines the property." Pet. App. at 18a. By this inversion of the proceedings below, respondents are led to a proposition all along urged by petitioners: that reservoir-wide "rights to produce" are "properties."

Respondents' error tellingly reveals TECA's inconsistency. Respondents appear to recognize that in earlier decisions, TECA has repeatedly held that "[t]he focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." *Grigsby v. Department of Energy*, 585 F.2d 1080, 1083, *modifying on rehearing* 585 F.2d 1069 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979); *Pennzoil Co. v. Department of Energy*, 680 F.2d 156, 168 (Temp. Emer. Ct. App. 1982). In *Pennzoil*, TECA emphasized that:

> The statement of the definition that "property means the right which arises from a lease or fee interest to produce crude petroleum" *is obviously quite different in meaning* than if the regulation had provided that "property means a lease or fee interest producing crude oil." [680 F.2d at 168 (emphasis added).]

Faced with TECA's abrupt departure in the decision below from its earlier decisions, respondents labor to fit the holdings into a consistent mold. But the effort is bootless. The decision under review specifically upheld DOE's "general position that the lease defines the property." Pet. App. at 18a.

These decisions cannot be reconciled in principle. Respondents attempt to distinguish the cases by noting that the units recognized as "properties" in *Grigsby* and *Pennzoil* were formed by aggregating portions of several leases or fee interests, while the reservoir-wide LOC units at issue here are formed by segregating discrete parts of a leasehold or fee interest. *See* Resp. Br. at 9-12. However, as TECA recognized in those cases, what counts for the purpose of identifying the "property" is not whether the unit is aggregated or segregated, but the derivation of the "right to produce" from that unit. The "right to produce" from both the units involved in *Grigsby* and the units at issue in this case derive from the same source: the orders of the LOC that establish and recognize those units. There is no meaningful way to distinguish between such units in determining the derivation of the "right to produce" and, hence, the "property."

It must be remembered that a producer in August 1973 had only the "property" definition itself for guidance in making "property" designations.[2] Under the position of respondents and the court below, a producer who in 1973 relied on the LOC unit rather than the lease in designating his "properties" would have been correct in the *Grigsby*-type situation but not in the situation presented in this case. The "property" definition itself admits of no such distinction, but focuses on one concept only: the "right to produce." Yet respondents and the court below would penalize producers for failing to foresee such an unstated distinction.

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[2] TECA's notion, quoted by respondents, that petitioners knew that they were adopting a novel interpretation, *see* Resp. Br. at 7, is therefore wholly unsupported in the record.

2. In deferring to DOE's interpretation, TECA did no more than determine that that interpretation was "reasonable" and "not clearly erroneous." Pet. App. at 14a, 16a. Yet TECA failed to recognize that DOE, in August 1976, was not interpreting a regulation that it had promulgated, but rather was interpreting a regulation adopted by another agency, the Cost of Living Council ("CLC"), fully three years earlier. Indeed, in its August 26, 1976 Notice, DOE attempted to determine, just as a court might, what CLC intended to signify by its definition of "property." Pet. App. at 66a-67a. DOE noted that the evidence as to CLC's intent "is not unambiguous"; that DOE had to "determine the legal significance of the words used to define the term"; and that DOE's general "lease defines the property" interpretation "appears . . . [to be] the reasonable meaning of the definition that CLC used. . . ." *Id.* at 66a. In short, DOE was no better situated in August 1976 to determine what the August 1973 CLC "property" definition meant than was a court. In such a circumstance, it was inappropriate for TECA to apply the minimal standard of review normally employed in reviewing an agency's interpretation of its own regulations.

It is significant that as late as April 1976, DOE itself believed that the 1973 "property" definition was intended to give effect to "the pre-existing regulatory concepts of state regulatory agencies." 41 Fed. Reg. 16179, 16180 (April 16, 1976); Petition at 6-7. Indeed, it referred specifically to LOC units, concluding that "in Louisiana each state-recognized unit may therefore appropriately describe a property, ..." 41 Fed. Reg. at 16180; Petition at 7. In this policy statement, DOE did not, as TECA and respondents state, merely "indicate[] the possibility that it might change its mind and adopt the definition contended for by [petitioners]." Pet. App. at 15a; Resp. Br. at 16. Rather, DOE was expressing its own interpretation of what the 1973 "property" definition meant "since the initiation of the price regulations." *See* 41 Fed. Reg. at 16180. DOE did not have any consistent

notion as to the scope of the "right produce" concept prior to August 1976. Thus, its first interpretation of that concept—that contained in its August 1976 Notice—does not merit the uncritical deference accorded it by the court below.

Respondents' reliance on the alleged change in policy that occurred with the enactment of the Energy Policy and Conservation Act, P.L. 94-163 ("EPCA"), is misplaced. *See* Resp. Br. at 4-5, 14. Respondents engage in the most remarkable contortion of language, *see* Resp. Br. at 2, to avoid saying that a primary objective of the two-tier pricing system instituted in August 1973 was, in the words of the court below, "that of stimulating increased domestic production of crude oil." Pet. App. at 14a. Respondents contend that that objective became of importance only with the passage of the EPCA in December 1975 and thus justified a change in the definition of "property." Resp. Br. at 14. To the contrary, increased production was a goal of the pricing system from its inception in August 1973. As DOE itself recognized in August 1976, petitioners' interpretation of "property" better comported with that objective than did DOE's general "lease defines the property" position. The EPCA thus does not support the supposed "reasonableness" of DOE's position and provides no reason for TECA to have deferred uncritically to that position.

3. Respondents' attempt to brush aside the effect of the decision below on the administration of the Windfall Profit Tax Act, P.L. 96-223, is similarly flawed. Regardless of the authority of the Secretary of the Treasury to change DOE regulations for tax purposes, the Secretary has in fact adopted a "property" definition that incorporates the "right to produce" concept and has basically tracked the language of DOE's August 1976 interpretation in defining "right to produce." 47 Fed. Reg. 50858, 50859 (November 10, 1982). Clarification of those terms by this Court is certain to control the application of those terms for windfall profit tax purposes.

CONCLUSION

For the foregoing reasons, and for those stated in the Petition, petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

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